Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GREEN FIRE & MARINE INSURANCE CO., LTD.,

Petitioner,

vs.

M/V HYUNDAI LIBERTY, *in rem*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under the Shipping Act of 1984, the Federal Maritime Commission regulates the practices of non-vessel-operating common carriers (NVOCCs) that furnish ocean transportation to shippers in the foreign commerce of the United States. The Commission regulates transactions between NVOCCs and the shippers to whom they sell their services, and between NVOCCs and the ocean common carriers from whom they purchase vessel services. Section 3(17)(B) of the Shipping Act defines the NVOCC as "a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier."

Did the court of appeals err in holding that NVOCCs are not shippers but, as a "commercial norm," are agents of the shipper when they contract for regulated transportation with ocean common carriers?

LIST OF ALL PARTIES

Petitioner Green Fire & Marine Insurance Co., Ltd. (formerly known as Kukje Hwajae Insurance Co., Ltd.), Seoul, Korea.

The M/V HYUNDAI LIBERTY, *in rem*, an oceangoing vessel, whose claimant in the district court was Hyundai Merchant Marine Co., Ltd., Seoul, Korea.

CORPORATE DISCLOSURE STATEMENT

On March 25, 2002, petitioner changed its name from Kukje Hwajae Insurance Co., Ltd. to Green Fire & Marine Insurance Co., Ltd. Petitioner has no parent corporation. The only publicly held company that owns 10% or more of petitioner's stock is Seyang Construction Industrial Co., Ltd.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Green Fire & Marine Insurance Co. Ltd. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The court of appeals' opinion (per Graber, J., joined by Beezer & Tashima, JJ.) (Pet. App. 1-16) is reported at 294 F.3d 1171. The court of appeals' subsequent order denying the petition for rehearing (*id.* at 44-45) is not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on June 26, 2002, and denied rehearing on August 28, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Shipping Act of 1984 § 3, 46 U.S.C. app. § 1702

§ 1702. Definitions

As used in this chapter –

. . .

(6) "common carrier" means a person holding itself out to the general public to provide transportation by

water of passengers or cargo between the United States and a foreign country for compensation that –

(A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. . . .

. . .

(16) "ocean common carrier" means a vessel-operating common carrier.

(17) "ocean transportation intermediary" means an ocean freight forwarder or a non-vessel-operating common carrier. For purposes of this paragraph, the term –

(A) "ocean freight forwarder" means a person that –

(i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and

(ii) processes the documentation or performs related activities incident to those shipments; and

(B) "non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

. . .

(21) "shipper" means –

(A) a cargo owner;

(B) the person for whose account the ocean transportation is provided;

(C) the person to whom delivery is to be made;

(D) a shippers' association; or

(E) an ocean transportation intermediary, as defined in paragraph (17)(B) of this section, that accepts responsibility for payment of all charges applicable under the tariff or service contract.

(22) "shippers' association" means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

STATEMENT OF THE CASE

1. Petitioner Green Fire & Marine Insurance Co. Ltd. (formerly Kukje Hwajae Insurance Co. Ltd.) is an insurance company in Seoul, Korea. Petitioner insured goods that were sold by Doosan Corporation in Seoul to Machine Tool Sales in Sterling Heights, Michigan. When the goods were damaged in transit, petitioner paid the loss and became subrogated to Doosan's rights against the liable parties.

2. Respondent is the M/V HYUNDAI LIBERTY, *in rem*, an ocean vessel owned and operated by Hyundai Merchant Marine Co., Ltd. The goods were damaged

during the vessel's voyage from the Port of Busan, Korea, to the Port of Long Beach, California. To recover for the loss, petitioner brought an *in rem* action against the vessel under the provisions of Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims.[1] Hyundai Merchant Marine filed a claim as owner of the vessel, under Supplemental Rule C(6), and then answered on the ship's behalf.

3. Petitioner's insured, Doosan, contracted with Glory Express, Inc., to transport the goods from Busan to Los Angeles. Glory Express is licensed by the Federal Maritime Commission as a non-vessel-operating common carrier ("NVOCC").[2] Under the Shipping Act of 1984,[3] the Commission has regulatory authority over NVOCCs providing transportation in the foreign oceanborne commerce of the United States. "Non-vessel-operating common carrier" is a statutory term of art; in the Shipping Act it means "a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier."[4]

Glory Express was a member of a shippers' association calling itself Streamline Shippers Association. As defined in the Shipping Act, "'shippers' association' means a group of shippers that consolidates or distributes freight on a

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[1] 28 U.S.C. FED. R. CIV. P. SUPP. R. C.

[2] According to the Commission's website, Glory Express is Organization No. 012406, and its tariff is published at WWW.PARAMOUNTTARIFF.COM. *See* FMC website (visited Nov. 18, 2002) <http://www.fmc.gov/fmcfrm1/scripts/ExtReports.asp?tariffClass=oti>.

[3] 46 U.S.C. app. §§ 1701-1719.

[4] Shipping Act of 1984 § 3(17)(B), 46 U.S.C. app. § 1702(17)(B).

nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts."[5] Streamline Shippers Association hired Hyundai Merchant Marine to carry the goods for its member, Glory Express, from Busan to Long Beach aboard the M/V HYUNDAI LIBERTY.

4. When goods are carried by water, for hire, between a foreign port and a U.S. port, the ocean carrier is required, upon demand of the shipper, to issue a bill of lading that recites the marks; number, quantity, or weight; and apparent order and condition of the goods. *See* the Carriage of Goods by Sea Act ("COGSA"), 49 Stat. 1208 § 3(3), 46 U.S.C. app. § 1303(3). In this case, each carrier – Glory Express and Hyundai Merchant Marine – issued a bill of lading. The Glory Express bill memorialized the contract of carriage between Glory Express and Doosan, the owner of the goods. The Hyundai Merchant Marine bill evidenced the contract of carriage between Hyundai and Streamline Shippers.

5. When petitioner brought an *in rem* action against the M/V HYUNDAI LIBERTY to recover for the damage to the goods during the voyage, the vessel defendant introduced the bill of lading that her owner, Hyundai Merchant Marine, had issued to Streamline Shippers, and moved the district court to enforce the bill's forum-selection clause, which required that suit be brought in the district court in Seoul, Korea. The court found that petitioner's assured, Doosan, had not been a party to the bill issued to Streamline Shippers, and denied the motion to dismiss.

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[5] *Id.* § 3(22), 46 U.S.C. app. § 1702(22).

Questioning whether petitioner, in its subrogation action, could pursue its *in rem* claim against the ship without eventually "accepting" the bill issued to Streamline Shippers, the court warned that it would dismiss the *in rem* action to Seoul if petitioner in future accepted the benefit of the vessel owner's bill. *See Kukje Hwajae Ins. Co. v. M/V HYUNDAI LIBERTY*, 1999 WL 1293507, 1999 A.M.C. 2199 (C.D. Cal. 1999) (Pet. App. 23-33). The M/V HYUNDAI LIBERTY moved for reconsideration, and the district court denied that motion as well (Pet. App. 34-41).

6. Petitioner and the M/V HYUNDAI LIBERTY then filed cross-motions for summary judgment. To establish that the vessel had received the goods at Busan in apparent good order and condition, petitioner cited the bill of lading issued by Hyundai to Streamline Shippers. A boilerplate provision on the back of that bill stated that the goods were loaded in apparent good order and condition unless notations of damage appeared on the front side of the bill. Based on Hyundai's claim to ownership of the M/V HYUNDAI LIBERTY, the absence of any notations on the face of the bill Hyundai issued constituted an admission by a party opponent – the vessel defendant, through her owner – that the goods had been loaded aboard in apparent good order and condition.

Disregarding the difference between an *evidentiary offer* of the terms of a contract as an admission by a party opponent and a third-party beneficiary's *acceptance* of the benefits of a contract, the district court held that petitioner had "accepted" the Hyundai bill of lading by offering it as evidence of an admission. The court then enforced the bill's forum-selection clause against petitioner by ordering the *in rem* action dismissed to Seoul, where it would be

time-barred by the one-year statute of limitations set forth in COGSA and in the bill of lading (Pet. App. 17-21).

7. Petitioner filed an appeal from the court's order of dismissal, and the M/V HYUNDAI LIBERTY filed a cross-appeal from the earlier order denying its motion to enforce the forum-selection clause in the Hyundai bill on the ground that Doosan was not bound by it.

8. The court of appeals' opinion does not discuss the issue appealed by petitioner: the lower court's determination that petitioner's evidentiary offer of the contract between Hyundai and the shippers' association operated as an acceptance of that contract by petitioner. The court of appeals affirmed the result below on an entirely different ground, holding that Doosan had been bound, after all, by the bill the vessel owner issued to Streamline Shippers. Though denominated as an affirmance on other grounds, this was, in fact, a reversal of the district court's earlier denial of the vessel's motion to dismiss under the vessel owner's forum-selection clause.[6] Though the opinion does not acknowledge this, the court of appeals implicitly granted the M/V HYUNDAI LIBERTY's cross-appeal from the denial of that motion.

The district court had found, as a fact, that petitioner's insured, Doosan, was not a party to the bill Hyundai Merchant Marine issued to the shippers' association. It found that the bill of lading which reflected the contract of carriage entered into by Doosan was the bill issued to Doosan by Glory Express. The record on appeal contained

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[6] *See M/V HYUNDAI LIBERTY*, *supra*, 1999 WL 1293507, 1999 A.M.C. 2199 (Pet. App. 23-33).

no evidence that Doosan had needlessly duplicated its contract with Glory Express by additionally contracting with Hyundai Merchant Marine – which would have obligated Doosan to pay twice for shipping the goods once. The record also contained no evidence that Glory Express had acted as Doosan's agent in procuring a vessel to carry the goods.

Despite the absence of any record evidence to support such a finding, the court of appeals held that Doosan had authorized Glory Express to act as its agent for purposes of binding Doosan to a contract of carriage with an ocean common carrier, and that Glory Express had done so by contracting, on Doosan's behalf, with Hyundai Merchant Marine. The court of appeals did not consider whether Glory Express could bind Doosan to the vessel owner's bill without Doosan's assent. Apparently, the court did not consider that the putative agent, Glory Express, actually must have Doosan's assent either to act as its agent directly or – another point the court overlooked – to delegate its alleged authority to Streamline Shippers Association, the party that contracted with Hyundai Merchant Marine and appeared as shipper in Hyundai's bill of lading. Relying on cases from the Second and Eleventh Circuits, the court of appeals held that the NVOCC contracts with the ocean carrier as the agent for the owner of the goods. *See Kukje Hwajae Ins. Co. v. M/V HYUNDAI LIBERTY*, 294 F.3d 1171, 1176 (9th Cir. 2002) (Pet. App. 8). The court of appeals then noted that "[n]othing in the record suggests that the relationship between Doosan and Glory Express *deviated from that commercial norm.*" *Id.* (Pet. App. 10) (emphasis added).

The court of appeals raised this agency theory *sua sponte* during oral argument; the vessel defendant had not

made an agency argument either in opposing petitioner's appeal or in bringing its cross-appeal. During oral argument, the court indicated its intention to rule that the NVOCC generally acts as the agent of the shipper, and thus binds the shipper to the bill of lading issued by the actual ocean carrier. As neither of the cross-appeals raised the agency issue, the court of appeals reached its decision without the benefit of briefing. In argument, petitioner's counsel asked the court to consider the conflict its agency theory would create with the statutory definition of "non-vessel-operating common carrier" set forth in the Shipping Act. The court's opinion quoted that definition, but relied instead on the jurisprudence: "Both commentators and courts have recognized that an NVOCC generally acts as the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." *Id.* at 1176 (Pet. App. 8-9).

9. Petitioner filed a timely petition for rehearing. The petition pointed out that the decision contradicted the basic rule that an agent cannot be created without the principal's consent; agency cannot arise by operation of law or by any "commercial norm." The petition also argued that the court of appeals had contradicted the plain meaning of the federal statute which defines the NVOCC and controls its relationship with shippers and with ocean common carriers. Under the Shipping Act, an NVOCC is not the agent of the shipper with whom it contracts; it is instead a carrier, albeit one without a vessel, and stands in the same relation to the vessel-operating common carrier as would a shipper who deals directly with that carrier. By redefining the NVOCC as an agent of the shipper instead of an independent carrier in a chain of carriers, the court

of appeals contravened and rejected the plain meaning of the statute.

The court of appeals acted on the petition for rehearing by ordering respondent to submit a response (Pet. App. 42-43). In its response, respondent adopted the court's theory that Glory Express had been Doosan's agent and thereby had bound Doosan to the owner's bill of lading. Following the response, the court of appeals issued an order denying the petition for rehearing (Pet. App. 44-45).

10. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

There are two reasons for granting the writ of certiorari. *First*, by ruling that Second Circuit case law supersedes the Shipping Act's definition of the "non-vessel-operating common carrier" as a *common carrier*, the court of appeals' decision expands the number of district courts that will be required to treat NVOCCs as shipper's agents rather than common carriers. This widening of the judicial redefinition of the statutory role and status of these common carriers has the potential to frustrate the national maritime policy behind the regulation of NVOCCs' transactions with shippers and ocean common carriers. Agency efforts to regulate NVOCCs began in 1961, and culminated in Congress' inclusion of a formal definition of NVOCCs in the Shipping Act of 1984. The Federal Maritime Commission is not likely to endorse the judicial redefinition of NVOCCs as shipper's agents. *Second*, the redefinition of NVOCCs by the Ninth and Second Circuits creates a conflict in the circuits over whether the NVOCC is a shipper's agent or a statutory common carrier.

1. *Statutory construction.* The role and status of non-vessel-operating common carriers ("NVOCCs") is prescribed and fixed by statute – the Shipping Act of 1984. The purpose of fixing their role and status is to enable the Federal Maritime Commission to regulate the practices of NVOCCs in furnishing ocean transportation to shippers such as petitioner's assured, and to regulate parallel transactions between NVOCCs and ocean common carriers. The Shipping Act affords a painstakingly tailored statutory scheme designed to accomplish the regulatory requirements of federal maritime policy.

The decision of the court of appeals contradicts the statutory definition of "non-vessel-operating common carrier," altering the NVOCC's statutory relationship with shippers on the one hand and with ocean common carriers on the other. The immediate effect of this decision is to enable ocean common carriers to enforce tariff and other contractual provisions against shippers with whom they are not in privity, simply by recharacterizing the NVOCCs with whom they contracted as agents of the shippers, thereby defeating Congress' definition of NVOCCs as statutory common carriers. It may be predicted that a long-term effect of the decision will be to frustrate the legislative purpose for regulating the practices of NVOCCs – to the detriment of the comprehensive scheme of federal maritime regulation of which the Shipping Act, administered by the Federal Maritime Commission, forms the central part.

2. *Circuit conflict.* The Court of Appeals for the Ninth Circuit held that the shipper, Doosan, was bound as a principal to the ocean carrier's bill of lading on the theory that the NVOCC, Glory Express, was the shipper's agent when it contracted with Hyundai Merchant Marine

for vessel transportation. According to the court, it is a "commercial norm" that the NVOCC is the agent of the shipper for purposes of contracting with the ocean carrier.[7] The Ninth Circuit thus aligned itself with the Second Circuit's view that the NVOCC acts as *agent of the shipper*.[8] These precedents appear to conflict with decisions of the First, Third, Eighth, and District of Columbia Circuits which have treated NVOCCs as *shippers* in their relationships with ocean common carriers.[9] Although the Eleventh Circuit once followed the Second Circuit's agency theory,[10] it has moved away from that view and now holds that a freight forwarder assuming the duties of a common carrier is not the agent of its shipper when it contracts with an ocean carrier for vessel transportation.[11] This Court has

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[7] *See M/V HYUNDAI LIBERTY*, *supra*, 294 F.3d at 1176 (Pet. App. 10).

[8] *See* Insurance Co. of North America v. S/S AMERICAN ARGOSY, 732 F.2d 299, 301 (2d Cir. 1984) (interpreting NVOCC definition as then codified at 46 C.F.R. § 510.2(*l*)) (Pet. App. 72).

[9] *See* Fireman's Fund American Ins. Cos. v. Puerto Rican Forwarding Co., 492 F.2d 1294, 1295 (1st Cir. 1974); Puerto Rico Maritime Shipping Authority v. Valley Freight Systems, Inc., 856 F.2d 546, 547 (3d Cir. 1988); New York Shipping Ass'n v. Federal Maritime Comm'n, 272 U.S. App. D.C. 129, 135-36, 854 F.2d 1338, 1344-45 (D.C. Cir. 1988); New York Foreign Freight Forwarders & Brokers Ass'n v. Interstate Commerce Comm'n, 191 U.S. App. D.C. 173, 183, 589 F.2d 696, 706 (D.C. Cir. 1979).

[10] *See* Insurance Co. of North America v. M/V OCEAN LYNX, 901 F.2d 934, 937 n.2 (11th Cir. 1990) (citing *S/S AMERICAN ARGOSY*, 732 F.2d at 301).

[11] *See* James N. Kirby Pty, Ltd. v. Norfolk Southern R. Co., 300 F.3d 1300, 1305 (11th Cir.), *reh'g & reh'g en banc denied*, ___ F.3d ___ (Oct. 7, 2002).

noted that NVOCCs are regulated by the Federal Maritime Commission,[12] but has never decided whether the NVOCC is a shipper or, instead, an agent of the shipper within the meaning of the Shipping Act definition of "non-vessel-operating common carrier."

1. The role and status of NVOCCs is prescribed by federal statute, and the decision below contravenes the statute.

Ocean transportation in the foreign commerce of the United States has been a subject of federal regulation since 1916, when Congress – concerned with ensuring a viable merchant marine in the context of the Great War in Europe – passed the Shipping Act, 1916, 39 Stat. 728, 46 U.S.C. §§ 801-842, and established the predecessor agency of the Federal Maritime Commission. Through the 1916 act's statutory successor, the Shipping Act of 1984, 98 Stat. 67, as amended, 46 U.S.C. §§ 1701-1719, Congress continues to regulate the foreign waterborne commerce of the United States and delegates the administration of such regulation to the Federal Maritime Commission.

Although today the regulation of NVOCCs forms an integral part of Congress' overall scheme, the term "non-vessel-operating common carrier" did not appear in the original Shipping Act, 1916, 46 U.S.C. §§ 801-842. NVOCCs did not come into being until the emergence of

[12] *See* NLRB v. International Longshoremen's Ass'n, AFL-CIO, 447 U.S. 490, 496 n.8 (1980).

containerization in the 1950s,[13] which created a demand for persons who could consolidate several small shipments in a single container and thereby save individual shippers the cost of shipping by "traditional, labor-intensive methods."[14]

The first regulatory definition of the NVOCC was the product of rulemaking by the Federal Maritime Commission, and specifies that the NVOCC procures a vessel "in his own name," not as an agent of the shipper:

> As defined in Commission decisions and regulation, an NVOCC is a person who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce as defined in the Shipping Act, 1916; *assumes responsibility or has liability imposed by law for the safe water transportation of the shipments and arranges in his own name with underlying water carriers for the performance of such transportation.*

Ship's Overseas Service, Inc. v. Federal Maritime Comm'n, 216 U.S. App. D.C. 146, 149, 670 F.2d 304, 307 (D.C. Cir. 1981) (emphasis added).[15]

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[13] This Court has noted that the first oceangoing containership was introduced in the Port of New York in 1957. *See* NLRB v. International Longshoremen's Ass'n, AFL-CIO, 473 U.S. 61, 65 (1985).

[14] New York Shipping Ass'n v. Federal Maritime Comm'n, 272 U.S. App. D.C. 129, 136, 854 F.2d 1338, 1345 (D.C. Cir. 1988).

[15] The court cited the Federal Maritime Board's ruling in Determination of Common Carrier Status, 6 F.M.B. 245, 256-57 (1961); two Federal Maritime Commission decisions, Pacific Coast European Conference v. Southern Pac. Marine Transport, Inc., 20 F.M.C. 166, 168

(Continued on following page)

In 1962, the Federal Maritime Commission[16] issued a notice of proposed rulemaking to define NVOCCs. The proposed definition closely tracked the language used by its predecessor agency, the Federal Maritime Board, to describe NVOCCs in *Determination of Common Carrier Status*, *supra* note 15, 6 F.M.B. at 256. The proposed definition was adopted as a final rule in 1963. *See* 28 Fed. Reg. 4300 (May 1, 1963) (codified at 46 C.F.R. § 510.21(d)). It was modified in a rulemaking entitled Licensed Independent Ocean Freight Forwarders, 46 Fed. Reg. 24565, 24569 (May 1, 1981) (codified at 46 C.F.R. § 510.2(*l*)) (Pet. App. 72).[17]

When Congress substantially revised the federal regulatory scheme by enacting the Shipping Act of 1984, it took care to include a statutory definition of the NVOCC:

> (17) "non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

Shipping Act of 1984, 98 Stat. 67 § 3(17), 46 U.S.C. app. § 1702(17) (recodified at 46 U.S.C. § 1702(17)(B)).

(1977) and Possible Violations of Section 18(a) of the Shipping Act, 1916, 19 F.M.C. 44, 56 (1975); and the definition of NVOCC at 46 C.F.R. § 510.21(d)).

[16] The Federal Maritime Board's powers were transferred to the Federal Maritime Commission, with effect from August 12, 1961, by Reorganization Plan No. 7 of 1961, 75 Stat. 840 (1961).

[17] The current definition of NVOCC is codified at 46 C.F.R. § 515.2(*l*) (Pet. App. 73).

In the Ocean Shipping Reform Act of 1998, 112 Stat. 1902, Congress amended the Shipping Act of 1984 but retained its NVOCC definition, combining NVOCCs with ocean freight forwarders under the rubric of "ocean transportation intermediaries." *See* Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 § 17, "Ocean Transportation Intermediaries," 46 U.S.C. app. § 1702(17) (defining ocean freight forwarders in subsection (17)(A) and NVOCCs in subsection 17(B)) (Pet. App. 46-47).

That Congress meant the NVOCC to be a shipper, not a shipper's agent, in contracting with ocean common carriers is evident from the current definition of "shipper" as including –

> **(E)** an ocean transportation intermediary, as defined in paragraph (17)(B) of this section [*i.e.*, an NVOCC], that accepts responsibility for payment of all charges applicable under the tariff or service contract.

Id. § 3(21)(E), 46 U.S.C. app. § 1702(21)(E) (Pet. App. 47).

Congress included persons acting as *shipper's agents* in its definition of ocean freight forwarders:

> "ocean freight forwarder" means a person in the United States that –
>
> dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments *on behalf of shippers* . . . .

Id. § 3(18), 46 U.S.C. app. § 1702(18) (emphasis added) (recodified as amended at 46 U.S.C. app. § 1702(17)(A)) (Pet. App. 46-47).

By holding as a matter of law that the NVOCC Glory Express was an agent, not a principal, to the contract with Hyundai Merchant Marine and that the cargo owner Doosan was instead the principal, the court of appeals' opinion purports to shift responsibility for payment of the ocean carrier from the NVOCC to the cargo owner. This contradicts the express allocation of such responsibility to the NVOCC at *id.* § 3(21)(E), 46 U.S.C. app. § 1702(21)(E) (Pet. App. 47).

The Shipping Act contemplates two separate transportation contracts – one between the cargo owner and the NVOCC; the other between the NVOCC and the ocean common carrier. The Federal Maritime Commission has the duty to regulate the carriers represented in each of these contracts. The act requires both ocean common carriers and NVOCCs to publish tariffs, and to observe their tariff provisions. *See id.* § 8, 46 U.S.C. app. § 1707 (Pet. App. 48-49). The act also authorizes the Commission to take action against ocean common carriers and NVOCCs that engage in prohibited acts. *See id.* § 10, 46 U.S.C. § 1709 (Pet. App. 50).

The court of appeals' opinion deals a double blow to this regulatory framework. First, it redefines the shipper-carrier relationship between the cargo owner and the NVOCC, thus running afoul of the Commission's regulation of NVOCCs through their carrier tariffs. Second, the opinion expressly nullifies the shipper-carrier relationship between the NVOCC and the ocean common carrier, contradicting the Commission's oversight of those transactions as well. Under the rule announced below – that the NVOCC, as a "commercial norm," is the agent of the shipper (*i.e.*, the cargo owner) – NVOCCs would, at a

minimum, be relieved of the statutory responsibility to pay ocean common carriers under applicable tariffs.

In 1990, Congress moved to strengthen the regulation of NVOCCs by enacting the Non-Vessel Operating Common Carrier Amendments, Pub. L. 101-595, 104 Stat. 2979 (1990) (formerly codified at 46 U.S.C. app. § 1721; recodified by Ocean Shipping Reform Act, 112 Stat. 1902, at 46 U.S.C. app. § 1718) (Pet. App. 51-54). These amendments to the Shipping Act require NVOCCs to post bonds as security for shippers' claims arising from transportation-related activities. As a result of these bonding requirements, the Commission now regulates more than 2,700 NVOCCs, both domestic and foreign. For fiscal year 2001, the Commission reported:

> At the end of the fiscal year, 1,331 freight forwarders, 1,251 U.S. NVOCCs, 844 joint NVOCC/ocean freight forwarders, and 38 foreign NVOCCs held active OTI licenses. An additional 599 foreign NVOCCs maintained proof of financial responsibility on file with the Commission but chose not to be licensed.

40th Annual Report for Fiscal Year 2001 (F.M.C. Mar. 31, 2002) at 98 (submitted to Congress pursuant to Reorganization Plan No. 7 of 1961, 75 Stat. 840 § 103(e) and Merchant Marine Act, as amended, § 208, 46 U.S.C. app. § 1118).

In the Shipping Act of 1984, the Non-Vessel Operating Common Carrier Amendments of 1990, and the amendments to the Shipping Act contained in the Ocean Shipping Reform Act of 1998, Congress consistently has defined the NVOCC as a *shipper* in its relationship with an ocean common carrier. In all three enactments,

Congress knew what it was doing. As this Court observed in construing another term defined in the 1916 Shipping Act, "[t]he common sense of all this, of course, is that Congress knew what it was about in both instances. We cannot ignore its repeated demonstrations of that fact. To do so would be to rewrite the statute . . . ." *United States v. American Union Transport, Inc.*, 327 U.S. 437, 456 (1946).

The Commission's determination to define and regulate NVOCCs[18] – culminating in the inclusion of NVOCCs in the Shipping Act of 1984[19] – is based on the experience recounted in the following excerpt from a decision which reveals that the Commission expressly rejects the view – adopted by the court of appeals – that an NVOCC is a "shipper's agent":

> In other contexts, carriers attempt to find their operations exempt from regulation by calling themselves by other names. For example, non-vessel operating common carriers by water have designated themselves as shippers' "agents" rather than carriers and have even disavowed cargo liability for cargo loss or damage or they have called themselves some other thing rather than what they truly are. The reason for these erroneous self-designations is usually to avoid

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[18] The final rule that first defined the NVOCC was proposed early in 1962, just six months after the transfer of authority from the Federal Maritime Board to the Federal Maritime Commission. *See* Practices of Licensed Independent Ocean Freight Forwarders, Ocean Freight Brokers, and Oceangoing Common Carriers – Notice of Proposed Rulemaking, 27 Fed. Reg. 1775 (Feb. 24, 1962).

[19] 98 Stat. 67 § 3(17), 46 U.S.C. app. § 1702(17) (recodified at 46 U.S.C. app. § 1702(17)(B)) (Pet. App. 47).

> some requirement of law, e.g., tariff-filing, avoidance of liability as a carrier or amenability to suit under section 22 of the 1916 Act, or avoidance of section 15 consequences. Thus, in Possible Violations of Section 18(a) of the Shipping Act, 1916, 19 F.M.C. 44 (1975), respondent claimed that it was not a carrier but a "shipper's agent" not subject to tariff-filing requirements. However, respondent was found to be a carrier by virtue of what it actually did, not what it named itself, and liability as a carrier was found to be imposed on respondent as a matter of law. . . . [I]t has long been recognized that a non-vessel operating common carrier by water and sometimes a vessel-operating carrier may take the position of shipper vis a vis another carrier, although maintaining its basic nature as a common carrier towards its own shippers. . . . [S]ee also Isbrandtsen Co. v. States Marine, 6 F.M.B. 422 (1961), a case illustrating how a vessel-operating carrier needing space to carry out its carrier obligations to its own shippers, can become a shipper itself when it books cargo on another carrier's vessels. The fact that a carrier may be shown as shipper or consignee on another carrier's bill of lading may determine the relationship between the two carriers but does not change the first carrier's status as a common carrier vis a vis the first carrier's shippers.

Prudential Lines, Inc. v. Farrell Lines, Inc., 26 F.M.C. 497, 515-16 (ALJ), *adopted*, 26 F.M.C. 496 (1984).

The Shipping Act definition of "non-vessel-operating common carrier" is important not only for the regulatory policy expressed in the act itself, but also because of the critical position NVOCCs – by consolidating small shipments into a single container – occupy in the movement of

oceangoing cargo containers into the United States from foreign ports. In the aftermath of 9/11, NVOCCs licensed by the Federal Maritime Commission figure prominently in rulemaking aimed at preventing the smuggling into this country of weapons of mass destruction. On October 31, 2002, in furtherance of the national security, the Department of the Treasury promulgated a final rule "to require the advance and accurate presentation of certain manifest information prior to lading at the foreign port and to encourage the presentation of this information electronically." 67 Fed. Reg. 66318 (Oct. 31, 2002) (Pet. App. 60-71). The purpose of the rule is to enable the Customs Service "to evaluate the risk of smuggling weapons of mass destruction through the use of oceangoing cargo containers before goods are loaded on vessels for importation into the United States," with a minimum of delay in the Customs processing of legitimate cargo. *See id.* (Pet. App. 60). The rule permits non-vessel-operating common carriers currently licensed by the Federal Maritime Commission to submit manifests electronically (Pet. App. 68-69), and imposes liquidated damages on any NVOCC whose electronic filing does not comply with the rule. *See id.* at 66320 (Pet. App. 67-68). The Treasury rule states that, as "a common carrier that does not operate the vessels by which the ocean transportation is provided," the NVOCC "would be considered a *shipper* in its relationship with the ocean common carrier." *Id.* (emphasis added) (Pet. App. 67).

The court of appeals' determination that NVOCCs are not shippers in their relationships with ocean common carriers, but instead are shipper's agents, contravenes the plain meaning of "non-vessel-operating common carrier," and throws a wrench into the statutory works by contradicting the system of tariffs created by the Shipping Act and enforced by the Federal Maritime Commission. It may

also confuse the Customs Service's reliance on Commission-licensed NVOCCs to help monitor imports and ferret out containerized weapons of mass destruction before they reach their intended recipients in this country.

2. The circuits conflict in their construction of the statute.

The courts of appeals differ in their construction of the Shipping Act definition of "non-vessel-operating common carrier." In the present case, the Ninth Circuit followed decisions of the Second[20] and Eleventh[21] Circuits in holding that the NVOCC, as a matter of law, is the "agent" of the shipper with whom it contracts.

Although the Eleventh Circuit, in *The M/V OCEAN LYNX*,[22] observed that the shipper could treat the NVOCC as a common carrier but underlying ocean common carriers treat the NVOCC as the shipper's agent,[23] the court has departed from that view in subsequent decisions. More recent Eleventh Circuit opinions characterize the NVOCC not as a shipper's agent, but as a carrier in relation to the shipper and a shipper in relation to the ocean common carrier. In *The M/V "TITAN SCAN"*[24] the Eleventh Circuit

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[20] *See S/S AMERICAN ARGOSY*, *supra*, 732 F.2d at 301 (interpreting NVOCC definition then codified at 46 C.F.R. § 510.2(*l*)) (Pet. App. 72).

[21] *M/V OCEAN LYNX*, 901 F.2d 934.

[22] *Id.*

[23] *Id.* at 937 n.2 (citing *S/S AMERICAN ARGOSY*, 732 F.2d at 301).

[24] *See* Itel Container Corp. v. M/V "TITAN SCAN," 139 F.3d 1450 (11th Cir.), *cert. denied sub nom.* Mammoet Shipping B.V. v. Sky

(Continued on following page)

held that the bill of lading contract between the shipper and NVOCC and the bill of lading contract between the NVOCC and ocean common carrier reflected two separate transactions.[25] In *Polo Ralph Lauren*,[26] the Eleventh Circuit reversed a dismissal of the shipper's cargo claim against the ocean common carrier, rejecting the lower court's ruling that the shipper had no standing because it was not a party to the ocean carrier's bill of lading issued to the NVOCC.[27] The Eleventh Circuit did not rule, however, that the shipper was a party to the ocean carrier's bill – the holding in the present case; it concluded there was an issue of whether the shipper was a *third-party beneficiary* of the ocean carrier's bill.[28] Most recently, the Eleventh Circuit has held that a freight forwarder which, by issuing its own bill of lading, assumed the duties of a non-vessel-operating common carrier, was not the shipper's agent, and did not bind the shipper to the bill of lading issued by the ocean common carrier.[29]

Other courts of appeals – although not called upon to interpret the Shipping Act definition of "non-vessel-operating common carrier" – have treated NVOCCs as

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Shipping Ltd., 525 U.S. 962 (1998) *and cert. denied sub nom.* Sky Shipping Ltd. v. Mammoet Shipping B.V., 525 U.S. 962 (1998).

[25] *See id.* at 1453.

[26] Polo Ralph Lauren, L.P. v. Tropical Shipping & Const. Co., 215 F.3d 1217 (11th Cir. 2000).

[27] *Id.* at 1221-23. The shipper argued that the NVOCC was its agent for purposes of contracting with the ocean common carrier, but the court of appeals declined to consider the argument because it had not been raised in the district court. *See id.* at 1223-24.

[28] *Id.* at 1222-23.

[29] *James N. Kirby Pty, supra*, 300 F.3d at 1305.

shippers in relation to ocean common carriers. These include the First,[30] Third,[31] and Eighth[32] Circuits.

Decisions of the District of Columbia Circuit also appear consistent with the plain meaning of the statutory definition. The principal service provided by NVOCCs – consolidating the shipments of two or more shippers into a single container, thereby reducing each shipper's cost below what it would have to pay an ocean carrier for the same shipment – was described in detail by the District of Columbia Circuit in *New York Shipping*, *supra*, 272 U.S. App. D.C. at 135-36, 854 F.2d at 1344-45. Earlier, the D.C. Circuit upheld a determination by the Interstate Commerce Commission to treat NVOCCs as the equivalent of surface freight forwarders when they bring themselves within ICC jurisdiction by offering through rates for combined water-motor service. *See New York Foreign Freight Forwarders*, *supra*, 191 U.S. App. D.C. at 183, 589 F.2d at 706 ("NVO's resemble domestic freight forwarders in that they hold themselves out to assume responsibility for the total shipment, and contract with underlying vessel-owning carriers for the actual transportation by water in foreign commerce.").

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[30] *See Fireman's Fund*, *supra*, 492 F.2d at 1295 (explaining that NVOCC is carrier in relation to its shipper and shipper in relation to actual water carrier).

[31] *See PRMSA*, *supra*, 856 F.2d at 547 ("Valley is a non-vessel-operating common carrier and stood as a shipper in relation to Authority in the transactions at issue here.").

[32] *See* Yellow Forwarding Co. v. Atlantic Container Line, 668 F.2d 350, 351 (8th Cir.), *cert. denied*, 456 U.S. 962 (1982) (explaining that NVO[CC] employs services of ocean carriers and makes profit by charging shipper more than it pays ocean carriers).

In reviewing a ruling by the National Labor Relations Board, this Court described the services performed by NVOCCs in consolidating small shipments into single containers for carriage by truckers and steamship lines, and noted that NVOCCs are regulated by the Federal Maritime Commission. *See NLRB v. International Longshoremen's Ass'n*, *supra*, 447 U.S. at 496 n.8. This Court has never ruled upon the statutory definition of "non-vessel-operating common carrier," and has never determined whether the NVOCC is an agent of the shipper as a matter of law. By granting certiorari, the Court can resolve the conflict in the circuits over whether the NVOCC binds itself or its shipper as principal to the contract of carriage with the ocean common carrier.

With this opinion, the Ninth Circuit joins the Second in contradicting the statutory definition of "non-vessel-operating common carrier" as "a shipper in its relationship with an ocean common carrier," as section 3(17)(B) of the Shipping Act provides. The Second Circuit came to this conclusion in *The S/S AMERICAN ARGOSY*, *supra*, 732 F.2d 299. Decided in the year the Shipping Act of 1984 was enacted, *The S/S AMERICAN ARGOSY* construed the definition of non-vessel-operating common carrier as it was then defined in the Commission's regulations. *See* 732 F.2d at 301 n.2 (quoting 46 C.F.R. § 510.2(*l*)) (Pet. App. 72). District courts have continued to apply the Second Circuit's interpretation to NVOCCs under the statutory definition in the Shipping Act of 1984. *See, e.g., Project Hope v. M/V IBN SINA*, 96 F. Supp. 2d 285, 296 (S.D.N.Y. 2000), *aff'd in part, vacated in part on other grounds*, 250 F.3d 67 (2d Cir. 2001) ("Under federal regulations, an NVOCC . . . is an agent of the shipper . . . in its relationship with an ocean common carrier."); *Modern Office*

System, Inc. v. AIM Caribbean Exp., Inc., 802 F. Supp. 617, 623 (D.P.R. 1992) ("With respect to the vessel and her owner, however, the NVOCC is an agent of the shipper. . . . ")

Although derivative of *The S/S AMERICAN ARGOSY*, the court of appeals' misinterpretation of the relationship between NVOCC and ocean common carrier in this case already has grown its own legs. The decision below served as authority for the result reached in *Jockey Intern., Inc. v. M/V "LEVERKUSEN EXPRESS,"* 217 F. Supp. 2d 447, 457 (S.D.N.Y. 2002) (quoting *The M/V HYUNDAI LIBERTY*, 294 F.3d at 1177) ("As the Ninth Circuit explained, 'because an NVOCC is considered, in general, to act as an agent for the cargo's owner when it contracts for carriage on a vessel, and because in this case [the NVOCC] was acting as [the cargo owner's] agent when it accepted the [shipper's] bill of lading, [the cargo owner's subrogated insurer] is bound by that bill.' ").

Shortly after the opinion below was issued, the Eleventh Circuit decided a similar case involving a freight forwarder that had performed the functions of an NVOCC by issuing a bill of lading in which it assumed carrier responsibility for the goods. In *James N. Kirby Pty*, *supra*, 300 F.3d 1300, the court of appeals reviewed the district court's determination that the appellee railroad, a subcontractor of the ocean common carrier whose ship had transported the appellant's goods, could enforce the ocean carrier's bill of lading against the shipper, even though the shipper had contracted not with the ocean carrier, but with an intermediary freight forwarder. Based on the fact that the freight forwarder issued its own bill of lading in which it undertook carrier responsibility for the goods, the Eleventh Circuit concluded that the shipper's contract of carriage was with the freight forwarder, not with the

ocean common carrier by whom the railroad had been employed. The court rejected the railroad's contention that the freight forwarder had functioned as the agent of the shipper and, as such, had bound the shipper directly to the ocean common carrier. The court found that the freight forwarder was itself the other principal to the ocean carrier's contract, and had bound only itself, not the shipper, to its terms. *See id.* at 1305-07.

Kirby implicitly operates on the principle that a person cannot be held to the terms of a contract to which he has not assented. In the present case, the court of appeals located the required meeting of the minds not in any evidence of assent by petitioner's assured (there was none), but in what it described as the "commercial norm" that NVOCCs are shipper's agents: "Nothing in the record suggests that the relationship between Doosan and Glory Express deviated from *that commercial norm*." *M/V HYUNDAI LIBERTY*, *supra*, 294 F.3d at 1176 (citing *M/V OCEAN LYNX*, *supra*, 901 F.2d at 937 n.2; *S/S AMERICAN ARGOSY*, 732 F.2d at 301). Treating the NVOCC as the shipper's agent, the court of appeals imposed the terms of the ocean carrier's bill of lading on a shipper that had contracted with the NVOCC, not with the ocean carrier. Based on this agency theory, the court of appeals enforced the ocean carrier's Korean forum-selection clause and dismissed the case. Petitioner's claim was thus dismissed under a forum clause in a bill of lading to which its assured had given neither assent nor acceptance. In order to enforce the forum-selection clause in the Hyundai bill, the court of appeals – lacking evidence of an agency agreement – concluded that the NVOCC was the agent of the shipper by operation of a "commercial norm."

When this Court, in *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*,[33] enforced a foreign arbitration clause against the insurer of a shipper who sought the exclusive remedy provided by COGSA,[34] surely it was not intended that the lower courts, thereafter, would enforce forum-selection clauses against *nonparties* to ocean-carrier bills of lading. By holding that NVOCCs, as a matter of law or commercial norm, are shipper's agents, the court of appeals below joins the Second Circuit in negating both a basic rule of contract law – assent to be bound[35] – and the statutory definition of NVOCC. Petitioner respectfully asks this Court to resolve this conflict in the circuits by overruling the Ninth and Second Circuits' "agency" definition of NVOCC.

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[33] 515 U.S. 528 (1995).

[34] Carriage of Goods by Sea Act, 49 Stat. 1208, 46 U.S.C. app. §§ 1300-1313.

[35] *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 194 (1976) (citing REST. CONTRACTS § 19(b) (1932); 1 SAMUEL WILLISTON, LAW OF CONTRACTS § 18(3) (3d ed. 1957)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 22, 2002.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KUKJE HWAJAE INSURANCE CO., LTD., a corporation,

Plaintiff-Appellant / Cross-Appellee,

v.

The "M/V HYUNDAI LIBERTY," her Engines, Boilers, Tackle, etc., in rem,

Defendant-Appellee / Cross-Appellant,

and

GLORY EXPRESS, INC., a business entity, in personam,

Defendant-Appellee,

GLORY EXPRESS, INC., a California Corporation,

Third-party plaintiff-Appellee,

v.

STREAMLINE SHIPPERS ASSOCIATION, a California Corporation,

Third-party defendant,

and

HYUNDAI MERCHANT MARINE CO., LTD., a business entity, DOES 1-10 inclusive,

Third-party defendants-Appellees.

Nos. 00-56970
00-57049

D.C. No.
CV-98-09217-ABC

OPINION

Appeals from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted
February 13, 2002 – Pasadena, California

Filed June 26, 2002

Before: Robert R. Beezer, A. Wallace Tashima, and Susan P. Graber, Circuit Judges.

Opinion by Judge Graber

COUNSEL

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Christina L. Owen and Robert E. Coppola, Cogswell Nakazawa & Chang, Long Beach, California, for the defendant-appellee/cross-appellant.

Simon H. Langer, Beverly Hills, California, for the defendant/third-party plaintiff-appellee.

OPINION

GRABER, Circuit Judge:

This case requires us to answer two questions: (1) whether the owner of cargo, who contracted with an intermediary non-vessel operating common carrier (NVOCC) to arrange for the carriage of cargo on a ship, was bound by the forum-selection clause in the bill of lading issued by the ship's owner to the NVOCC, and (2) whether the NVOCC was entitled to take advantage of a statutory limitation of liability by having given the cargo's owner a "fair opportunity" to opt for higher limits by

paying a greater charge. We hold that the cargo's owner was bound by the forum-selection clause and that the statutory limitation of liability applies. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Kukje Hwajae Insurance Company is the subrogated insurer of the Doosan Corporation, a Korean manufacturer of machinery. Doosan contracted with Glory Express, Inc., an NVOCC, to ship a "Doosan Brand Vertical Twin Spindle CNC Lathe" from Busan, Korea, to Los Angeles, California, on the vessel the Hyundai Liberty. Glory Express issued three bills of lading to cover the shipment. Each one identifies Doosan as the shipper and the "Hyundai Liberty" as the "Exporting Carrier." The Glory Express bills of lading contain a forum-selection clause requiring that all suits relating to the carriage of goods covered by the bills of lading be brought in the federal courts in New York, although Glory Express has not sought to enforce that clause here.

Glory Express, in turn, contracted with Hyundai Merchant Marine Company to ship the lathe on its vessel, the Hyundai Liberty. It did so by acting through Streamline Shippers Association, a nonprofit organization of shippers (Streamline).[1] Hyundai Merchant Marine issued a bill of lading identifying Streamline as the shipper. That bill of lading provided:

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[1] Streamline acted as the agent of Glory Express; for the practical purpose of this appeal, they are indistinguishable.

> The claims arising from or in connection with or relating to this Bill of Lading shall be exclusively governed by the law of Korea except otherwise provided in this Bill of Lading. *Any and all action concerning custody or carriage under this Bill of Lading whether based on breach of contract, tort or otherwise shall be brought before the Seoul Civil District Court in Korea.*

(Emphasis added.)

According to Plaintiff's complaint, the lathe was damaged during the course of the sea voyage, resulting in more than $200,000 in damages. Plaintiff paid Doosan's claim and then initiated this action. The complaint asserted claims for damage to cargo, breach of contract, negligence, breach of duty to care for property in bailment, and unseaworthiness. Plaintiff brought the action in personam against Defendant Glory Express and in rem against the Hyundai Liberty (Hyundai).[2]

Hyundai moved to dismiss Plaintiff's complaint as to the vessel, seeking to enforce the forum-selection clause in its bill of lading. The district court denied the motion, in part because it found that Hyundai had not properly authenticated the copy of the bill of lading that it had attached to its motion.[3] Additionally, the court denied the

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[2] Pursuant to Federal Rule of Civil Procedure C(6) (Supplemental Rules for Certain Admiralty and Maritime Claims), the Hyundai Liberty is represented in this action by its owner, Hyundai Merchant Marine Company.

[3] That defect was cured at a later date, and neither party argues that the initial lack of authentication has any bearing on our resolution of the legal issues presented here.

motion because Plaintiff's subrogor, Doosan, had not "accepted" the bill of lading and it was, therefore, not enforceable against Plaintiff. The court stated further that, if Plaintiff "accepted" the bill during the litigation by relying on it to establish an element of one of its claims, the court would entertain again Hyundai's motion to enforce the forum-selection clause.

Hyundai filed a motion for partial summary judgment on the ground that the Carriage of Goods by Sea Act (COGSA) – specifically 46 U.S.C. app. § 1304(5) – limited the ship's in rem liability. Over Plaintiff's opposition, the court granted the motion.

Plaintiff then moved for summary judgment against Glory Express. The court granted the motion in part, holding that Glory Express was liable to Plaintiff for damage to the lathe, but that its liability was limited by the terms of the Glory Express bills of lading and by COGSA. At that time, the court did not calculate the total amount of damages for which Glory Express was liable, because Plaintiff had not established how many "packages" had been shipped for purposes of COGSA. Glory Express then moved for summary judgment on the ground that the total number of packages shipped was six. The court granted the motion.

Plaintiff and Hyundai filed cross-motions for summary judgment on the issue of the vessel's in rem liability. Each party opposed the other's motion. The court denied both parties' motions and, instead, dismissed the case. The court reasoned that Plaintiff's use of a part of the Hyundai bill of lading to establish that the goods were delivered on board the Hyundai Liberty in good condition constituted "acceptance" of the bill of lading. The court also held

that "any claim that Kukje has against the Hyundai Liberty must be brought pursuant to the Hyundai's Bills of Lading." The court dismissed the action with respect to the Hyundai "without prejudice to Plaintiff's right to bring a claim that complies with the forum selection clause of the Hyundai's Bills of Lading."

Plaintiff and Hyundai timely appealed.

STANDARDS OF REVIEW

We review for abuse of discretion the district court's decision whether to enforce a forum-selection clause. *Fireman's Fund Ins. Co. v. M.V. DSR Atl.*, 131 F.3d 1336, 1338 (9th Cir. 1998). A motion to enforce a forum-selection clause is treated as a motion pursuant to Federal Rule of Civil Procedure 12(b)(3). *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996). Consequently, the pleadings need not be accepted as true, and facts outside the pleadings properly may be considered. *Id.*

We review de novo the district court's grant of summary judgment. *Balint v. Carson City,* 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc).

DISCUSSION

A. *Whether Plaintiff is bound by the forum-selection clause in the Hyundai bill of lading.*

Plaintiff argues that the district court erred by dismissing the in rem action because of the forum-selection clause. Plaintiff contends that the clause does not bind it because Plaintiff's subrogor, Doosan, never accepted the Hyundai bill of lading and, therefore, is not a party to the contract. Plaintiff argues that its evidentiary

use of the bill of lading did not operate as "acceptance" of the contractual terms of the bill. Because Plaintiff does not seek to enforce the contractual terms of the bill of lading, but has brought a tort claim for cargo damage, and because neither Plaintiff nor its subrogor is a party to the bill of lading, Plaintiff reasons that the forum-selection clause is not enforceable against it.

Hyundai, by contrast, argues that the court erred by not enforcing the forum-selection clause at the *outset* of the litigation. Hyundai asserts that the clause is enforceable against Plaintiff because Plaintiff's subrogor is a party to the bill of lading or, in the alternative, is so "closely related" to the transaction that the clause is enforceable. We agree with Hyundai that the in rem action should have been dismissed at the outset for want of jurisdiction.

As an initial matter, it is clear that Plaintiff's in rem action for cargo damage, characterized by Plaintiff as a tort,[4] is within the scope of the forum-selection clause. The text of the clause provides: "Any and all action concerning custody or carriage under this Bill of Lading whether based on breach of contract, tort or otherwise shall be brought before the Seoul Civil District Court in Korea." Plaintiff's action concerns damage to the lathe that occurred during "carriage under this Bill of Lading" on board the Hyundai Liberty.

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[4] *But see Polo Ralph Lauren, L.P. v. Tropical Shipping & Constr. Co.*, 215 F.3d 1217, 1220-21 (11th Cir. 2000) (holding that, when COGSA applies, it provides the exclusive remedy for cargo damage claims, which are "hybrid" contract-and-tort claims).

It also is clear that enforcement of the clause does not contravene COGSA. In *Fireman's Fund,* we approved a similar forum-selection clause requiring that a claim for cargo damage be brought in Korea. 131 F.3d at 1338-40. In that case, the plaintiff (the consignee of the cargo covered by the bill of lading at issue) brought claims for cargo damage in both an in rem action against the vessel and an in personam action against the vessel's charterer. *Id.* at 1339. We rejected the plaintiff's argument, which posited that COGSA barred enforcement of the forum-selection clause because in rem proceedings are not available under Korean law, and we held that the district court abused its discretion when it declined to enforce the clause. *Id.* at 1338-40. We remanded the case to district court to dismiss the in rem and in personam proceedings for "want of jurisdiction." *Id.* at 1340.

Therefore, we can, consistent with both precedent and the terms of the bill of lading, apply the Korean forum-selection clause to Plaintiff's in rem action. The question is whether the clause can be enforced against *Plaintiff.* We conclude that it can. That is because the commercial role of an NVOCC, as well as the facts of this case, lead to the conclusion that Glory Express was acting as Doosan's agent when it accepted the Hyundai bill of lading. As a result, Doosan – and thus Plaintiff, as Doosan's subrogee – are bound by the forum-selection clause in the Hyundai bill of lading.

As defined by federal statute, an NVOCC is "a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." 46 U.S.C. app. § 1702(17)(B). Both commentators and courts have recognized that an NVOCC generally acts as the agent of

the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods.

> A non-vessel operating common carrier, or NVOCC, contracts with its customers as principal, agreeing to transport their goods on a voyage that includes an ocean leg. An NVOCC commonly issues bills of lading to its customers in its own name, even though it does not operate the ship that will carry the goods on the ocean voyage. It buys space on the carrying ship like any other customer, receiving a bill of lading from the owner or charterer of that ship when the goods are loaded on board. It commonly consolidates goods from several different shippers into a single container, receiving a bill of lading from the ocean carrier in relation to the container as a whole. The NVOCC is not authorized by the owner or master of the carrying ship to issue bills of lading that will bind the ship; indeed, the ocean carrier may have no idea that the party to whom it issues its bill is in fact an NVOCC that has issued bills of lading itself. The relationship between ocean carrier and NVOCC is therefore not one of agency, but is a contractual one embodied in the ocean carrier's bill of lading, under which the NVOCC is the shipper. The NVOCC does not contract with the owners of the goods as agent for the ship. *Quite the reverse, it contracts with the ocean carrier as agent for the owners of the goods.*

Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification,* 75 Tul. L. Rev. 337, 395-96 (2000) (footnote citations omitted) (emphasis added); *see also Ins. Co. of N. Am. v. M/V Ocean Lynx,* 901 F.2d 934, 937 n.2 (11th Cir. 1990) ("[The cargo owner] may treat [the NVOCC] as a common carrier for purposes of COGSA, but

underlying carriers . . . treat [the NVOCC] as [the cargo owner's] agent." (emphasis added)); *Ins. Co. of N. Am. v. S/S Am. Argosy,* 732 F.2d 299, 301 (2d Cir. 1984) ("With respect to the vessel and her owner, however, the NVOCC is an agent of the shipper. . . ."); *Orion Ins. Co. v. M/V "Humacao",* 851 F. Supp. 575, 577-78 & 577 n.4 (S.D.N.Y. 1994) (concluding that an NVOCC acts as the agent of the cargo owner when it agrees to the terms of the bill of lading issued by the vessel's owner).

Nothing in the record suggests that the relationship between Doosan and Glory Express deviated from that commercial norm. To the contrary, the record shows that Doosan intended Glory Express to act as its agent for the purpose of shipping the lathe.[5] The bills expressly provide that Doosan and Glory Express agree that Glory Express will arrange for the carriage of the lathe on board the Hyundai Liberty. Moreover, by the terms of the bills, Glory Express had authority to use whatever form of transportation it thought was necessary to transport the goods: "The Carrier shall have the right at its sole discretion to use feederships, ferries, lighters, trucks, trains or planes, in

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[5] By recognizing that Glory Express acted as Doosan's agent when it accepted the Hyundai bill of lading, we do not mean to suggest that the relationship between Glory Express and Doosan was one of agent and principal for all purposes. It is clear from the Glory Express bills of lading, for example, that the parties intended that Glory Express would be independently liable, to some extent, for loss or damage to the lathe that occurred during shipping. *See, e.g.,* Harold Gill Reuschlein & William A. Gregory, The Law of Agency and Partnership § 7 (2d ed. 1990) (distinguishing between general agents and special agents; the latter is authorized to conduct a single transaction or series of transactions not involving continuity of service).

addition to the Ocean Vessel or its substitute to accomplish said carriage." *Cf. Morrow Crane Co. v. Affiliated FM Ins. Co.,* 885 F.2d 612, 613 (9th Cir. 1989) (concluding that the independent freight forwarder with whom the cargo owner contracted to arrange for the shipping of a crane was cargo owner's agent vis-à-vis the vessel's operator).

Glory Express thus had both the express duty and the express authority to ship the lathe on the Hyundai Liberty and to do, within reason, whatever it needed to do in order to fulfill that obligation. Accepting the Hyundai bill of lading was a necessary – and reasonable – step for Glory Express to fulfill its obligation to Doosan. Therefore, Doosan and Plaintiff are bound by Glory Express' acceptance of the Hyundai bill of lading. *Lux Art Van Serv., Inc. v. Pollard,* 344 F.2d 883, 887 (9th Cir. 1965) ("'A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorized him to do, but also whatever usually belong to the doing of it or is necessary to its performance.'" (quoting *Law v. Stokes,* 90 Am. Dec. 655, 656-57 (N.J. 1867))).

In short, because an NVOCC is considered, in general, to act as an agent for the cargo's owner when it contracts for carriage on a vessel, and because in this case Glory Express, consistent with that commercial norm, was acting as Doosan's agent when it accepted the Hyundai bill of lading, Plaintiff is bound by that bill. Consequently, the district court abused its discretion when it failed to enforce the forum-selection clause at the outset of the litigation on the ground that Doosan had not accepted the Hyundai bill

of lading. Nonetheless, we affirm. The district court properly dismissed Plaintiff's in rem action against the Hyundai Liberty (albeit for the wrong reason).[6]

B. *Whether the liability limitations contained in the Glory Express bills of lading meet the COGSA "fair opportunity requirement."*

In some instances, 46 U.S.C. app. § 1304(5) limits a carrier's potential liability for loss or damage related to the carriage of goods. It provides in pertinent part:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

Previously, we have identified the circumstances under which a carrier is entitled to the benefit of that limitation of liability:

> A carrier may limit its liability under COGSA only if the shipper is given a "fair opportunity" to opt for a higher liability by paying a correspondingly greater charge. The carrier has

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[6] Because the action should have been dismissed at the outset for want of jurisdiction, we do not reach the question whether the COGSA limitations of liability apply to Plaintiff's action against the Hyundai Liberty.

> the initial burden of producing *prima facie* evidence showing that it provided notice to the shipper that it could pay a higher rate and opt for higher liability. The carrier satisfies this initial burden by legibly reciting the terms of 46 U.S.C. App. § 1304(5) or language to the same effect in the bill of lading. The burden then shifts to the shipper to prove it was denied such an opportunity.

Vision Air Flight Serv., Inc. v. M/V Nat'l Pride, 155 F.3d 1165, 1168-69 (9th Cir. 1998) (citations and internal quotation marks omitted).

Plaintiff does not contest the applicability of COGSA to the Glory Express bills of lading. It argues, instead, that Glory Express cannot avail itself of the COGSA limitations on liability because the Glory Express bills do not comply with the "fair opportunity" requirement.

The Glory Express bills of lading contain the following provision:

> In case of any loss or damage to or in connection with goods exceeding in actual value the equivalent of $500 lawful money of the United States per package, or in case of goods not shipped in package, per shipping unit, the value of the goods shall be deemed to be $500 per package or per shipping unit. The Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per shipping unit or pro rata in case of partial loss or damage, *unless the nature of the goods and a valuation higher than $500 per package or shipping unit shall have been declared in writing by the Shipper upon delivery to the Carrier and inserted in this bill of lading and extra charge paid.* In such

> case, if the actual value of the goods per package or per shipping unit shall exceed such declared value shall nevertheless be deemed to be declared value and the Carrier's liability, if any, shall not exceed the declared value and any partial loss or damage shall be adjusted pro rata on the basis of such declared value. The words "shipping unit" shall mean each physical unit or piece of cargo not shipped in a package, including articles or things of any description whatsoever, except goods shipped in bulk, and irrespective of weight or measurement unit employed in calculating freight charges.

(Emphasis added.)

That provision meets the requirements of COGSA. Its text tracks that of 46 U.S.C. app. § 1304(5). The above-quoted passage explicitly limits Glory Express' liability and informs the shipper – in this case, Doosan – that it can opt for higher liability by declaring the value of the goods and paying an extra charge. *See Vision Air,* 155 F.3d at 1169 (approving a similar provision).

Plaintiff argues that the provision's reference to a "shipping unit" invalidates the clause, because it does not echo the statutory phrase "customary freight unit" and therefore operates to reduce Glory Express' liability below the level permitted by COGSA. We rejected an identical argument in *Vision Air,* 155 F.3d at 1169-70. There, the plaintiff argued that the carrier's attempt to limit liability to $500 per "container," as distinct from "package" or "customary freight unit," invalidated the liability limitation. We disagreed:

> When faced with a carrier's attempt to reduce liability through enterprising definitions of

> "package," other courts have simply redefined "package" or "customary freight unit" according to the dictates of COGSA. Other courts have not, as [the plaintiff] urges this court to do, held the limitation of liability provision void altogether.
>
> Whether or not the bill of lading "mislabeled" or "misbundled" freight units, it nonetheless gave [the plaintiff] notice that [the carrier]'s liability was limited, and invited [the plaintiff] to opt for a higher liability by paying a correspondingly greater freight charge. This is all COGSA requires.

Id. at 1170 (citations omitted).

Under the standard articulated in *Vision Air,* Glory Express established a prima facie case of compliance with the "fair opportunity" requirement. Because Plaintiff argues only that Glory Express failed to establish its prima facie case, and does not attempt to show that Doosan actually was denied the opportunity to declare a higher value, we affirm the district court's holding that the Glory Express bills of lading comply with the "fair opportunity" requirement of COGSA.

CONCLUSION

With respect to the in rem action: The forum-selection clause in the Hyundai bill of lading is enforceable against Plaintiff. As a result, the district court lacked jurisdiction over Plaintiff's in rem action against the Hyundai Liberty and properly dismissed that action.

With respect to the in personam action: The Glory Express bills of lading comply with the COGSA "fair opportunity" requirement. Therefore, Glory Express is

entitled to the limitations on liability provided in 46 U.S.C. app. § 1304(5), and the district court properly granted summary judgment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KUKJE HWAJAE INSURANCE CO., LTD.,

Plaintiff,

v.

THE M/V HYUNDAI LIBERTY and GLORY EXPRESS, INC.,

Defendants.

GLORY EXPRESS, INC.,

Third-Party Plaintiff,

v.

STREAMLINE SHIPPERS ASSOC. and HYUNDAI MERCHANT MARINE CO., LTD.,

Third-Party Defendants.

CV 98-9217-ABC (RZx)

ORDER DENYING CROSS-MOTIONS FOR SUMMARY JUDGMENT, DISMISSING CLAIMS AGAINST THE M/V HYUNDAI LIBERTY, AND TERMINATING CASE

Plaintiff Kukje Hwajae Insurance Company and Defendant the Hyundai Liberty filed cross-motions for summary judgment on the issue of the Hyundai Liberty's liability. On review of the materials submitted by the parties, the Court finds the motions appropriate for submission without oral argument. Fed. R. Civ. P. 78; Local Rule 7.11. The noticed hearing date of October 16, 2000 is VACATED.

After considering the materials submitted by the parties and the case file, the Court DENIES the cross-motions. However, the Court DISMISSES the case based on the Hyundai Liberty's forum selection clause.

I. Background

This is the fourth and fifth in a series of summary judgment motions that this Court has considered in this case. In the first one, the Court found that Defendant the Hyundai Liberty's liability on Plaintiff's claim was limited to $3,000. In the second motion, the Court found that Plaintiff was entitled to judgment against Glory Express. In the third motion, the Court found that Glory Express was liable in the amount of $3,000.

In these cross-motions, the parties seek to establish the liability of the Hyundai Liberty. The Hyundai Liberty asserts that Kukje has no evidence to support its claims. Kukje counters that the Hyundai Liberty is liable because (1) the Court has found that Glory Express is liable, and (2) the Hyundai Liberty's Bills of Lading establish that the Hyundai Liberty received the shipment in good condition.

II. Analysis

A. The Liability of the Glory Express.

The Court finds that the Hyundai Liberty cannot be held liable based on the finding that Glory Express is liable. The Glory Express is a non-vessel operating common carrier ("NVOCC"). "NVOCCs operate as middlemen: they arrange for relatively small shipments to be picked up from shippers, consolidate the smaller parcels, and ship them via a carrier or several carriers. They do not,

however, own or charter the ships that actually carry the cargo." *Insurance Co. of North America v. S/S American Argosy,* 732 F.2d 299, 301 (2d Cir. 1984). An NVOCC is a common carrier with respect to the shipper who uses its services. *Id.* "With respect to the vessel and her owner, however, the NVOCC is an agent of the shipper, and thus merely a customer – indeed, only one customer among hundreds on any given voyage." *Id.* Accordingly, a vessel cannot be held liable under the bill of lading issued by an NVOCC. *Id.* at 304.

Here, Glory Express is liable to Kukje under the bills of lading issued by Glory Express. Thus, the liability of Glory Express, an NVOCC, cannot be extended to the Hyundai Liberty, which is the vessel that carried the shipment.

B. The Hyundai Liberty's Bills of Lading.

Alternatively, Kukje points to the Hyundai's Bills of Lading as proof of its claims. Specifically, Kukje asserts that the Bills of Lading show that the Hyundai Liberty received the shipment in good condition. Because the Hyundai Liberty returned the goods in damaged conditioned [*sic*], Kukje claims that it has established a prima facie case of liability.

The Hyundai Liberty asserts that Kukje's reliance on the Hyundai's Bills of Lading entitles it to invoke the forum selection clause in the Bills of Lading. As support, the Hyundai Liberty points to this Court's previous order, in which the Court stated: "if during the course of this litigation Kukje 'accepts' the Hyundai Bill of Lading by, for example relying on its terms to establish an element of its claims, the Court would entertain a renewed motion to

enforce the forum selection clause contained therein." (5/24/99 Order at 9.) Kukje, however, counters that it is not relying on the Bills of Lading but merely using the Bills as evidence.

The Court believes that Kukje's use of the bills of Lading constitutes an acceptance of the Hyundai's Bills of Lading. Thus, the Court finds that the Hyundai Liberty can invoke the forum selection clause.

Additionally, the Court notes that in its May 24, 1999 Order, the Court reserved the question of "[w]hether Kukje *nee[ed]* [*sic*] to accept the contract to maintain its claims against the M/V Hyundai Liberty." (*Id.* at 9:16-18.) The Court now finds that any claim that Kukje has against the Hyundai Liberty must be brought pursuant to the Hyundai's Bills of Lading. Various other courts have held the liability of a carrier is determined by its own bill of lading even where the actual owner and the shipper deal through the intermediary of a NVOCC. *See Insurance Co. of North America,* 732 F.2d at 304; *SPM Corp. v. M/V Ming Moon,* 965 F.2d 1297, 1305 n.9 (3d Cir. 1992); *Nippon Fire & Marine Ins. Co., Ltd. v. Skyway Freight Systems, Inc.,* 45 F. Supp. 2d 288, 293-94 (S.D.N.Y. 1999).

The rationale for this holding is described in *Nippon Fire & Marine*:

> As a general matter, a common carrier can assume that one presenting goods for shipment either owns them or has authority to ship them. . . . This must be, since nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered the goods for transportation. . . . [A] common carrier should be able,

> absent special circumstances, to assume that the individual who proffers the goods for shipment can accept a bill of lading under the terms and conditions of shipment stated therein. Absent special circumstances, the risk that the individual presenting the goods for shipment is unauthorized is better borne by the actual owners of the goods than a common carrier. . . . Based on these principles, . . . it would be unreasonable to hold a carrier liable beyond the terms of its bill of lading even where it had no dealing with the shipper.

45 F. Supp. 2d at 293-94 (internal citations and quotations omitted.) Kukje does not point to any unusual circumstances. Thus, Kukje cannot establish liability outside of the terms of the Hyundai's Bills of Lading.[1]

III. Conclusion

Accordingly, the Court DENIES the cross-motions for summary judgment.

The Court DISMISSES the claims against the Hyundai Liberty. The dismissal is without prejudice to Plaintiff's right to bring a claim that complies with the forum selection clause of the Hyundai's Bills of Lading.

SO ORDERED.

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[1] At the same time, the Court notes that the Bills of Lading preclude the Court from granting summary judgment in favor of the Hyundai Liberty.

DATED: Oct. 10, 2000

/s/ Audrey B. Collins
AUDREY B. COLLINS
UNITED STATES
DISTRICT JUDGE

APPENDIX C

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KUKJE HWAJAE INSURANCE COMPANY, LTD., Plaintiff, v. THE M/V HYUNDAI LIBERTY (*in rem*), GLORY EXPRESS, INC. (*in personam*), Defendants.	CASE NO.: CV 98-9217 ABC (RZx) ORDER RE: DEFENDANT M/V HYUNDAI LIBERTY'S MOTION TO DISMISS THIRD-PARTY DEFENDANT HYUNDAI MERCHANT MARINE COMPANY, LTD.'S MOTION TO DISMISS (Filed May 24, 1999)
GLORY EXPRESS, INC. Third-Party Plaintiff, v. STREAMLINE SHIPPERS ASSOCIATION, HYUNDAI MERCHANT MARINE COMPANY, LTD., Third-Party Defendants.	

Defendant the M/V Hyundai Liberty's Motion to Dismiss, and Third-Party Defendant Hyundai Merchant Marine Company, Ltd.'s Motion to Dismiss, came on regularly for hearing before this Court on May 24, 1999. After reviewing the materials submitted by the parties,

argument of counsel, and the case file, it is hereby ORDERED that (1) the M/V Hyundai Liberty's Motion is DENIED, and (2) Hyundai Merchant Marine Company, Ltd.'s Motion is GRANTED.

I. FACTUAL BACKGROUND

This action arises from the ocean carriage of cargo from Busan, Korea to Long Beach, California aboard the defendant vessel, the M/V Hyundai Liberty. The cargo was ultimately delivered in a "severely damaged condition." Compl. ¶ 8.

The cargo at issued [*sic*] was originally consigned to Doosan Corporation, Doosan America Corporation, and Doosan Machinary [*sic*] USA Inc. (collectively "Doosan"). Compl. ¶ 2. Plaintiff Kukje Hwaje [*sic*] Insurance Co. ("Kukje") is Doosan's subrogated insurer. Kukje alleges that it reimbursed Doosan for damage to the cargo, and that therefore Kukje has been subrogated to Doosan's right to recover from third-parties.

Doosan contracted with Defendant and Third-Party Plaintiff Glory Express, Inc. ("Glory Express") to transport the cargo from Korea to California. Although it is not clear from either the pleadings or the motion papers, it appears that Glory Express subsequently contracted with Third-Party Defendant Streamline Shippers Association, Inc. ("Streamline"), a California based non-vessel-operating common carrier, which in turn contracted with Third-Party Defendant Hyundai Merchant Marine Co., Ltd. ("Hyundai"), the owners and operators of *in rem* Defendant the M/V Hyundai Liberty. The cargo was eventually shiped [*sic*] pursuant to a Hyundai bill of lading that lists Streamline as the "shipper," "consignee," and "notify

party." (the "Hyundai Bill of Lading"). *See* Mot., Exh. A. The Hyundai Bill of Lading does not, however, expressly name either Doosan, Kukje, or Glory Express as a named party. The bill of lading contains a forum selection clause, pursuant to which "all actions concerning custody or carriage under the Bill of Lading whether based on breach of contract, tort or otherwise shall be brought in [Korea]."

II. PROCEDURAL BACKGROUND

On November 16, 1998, Kukje filed a complaint, in admiralty, asserting causes of action for (1) damage to cargo; (2) breach of contract; (3) negligence; (4) breach of duty to care for property in bailment; and (5) unseaworthiness. The action was brought *in rem* against Defendant the M/V Hyundai Liberty, and *in personam* against Glory Express. On February 26, 1999, Glory Express filed a Third Party Complaint for Indemnification against Streamline and Hyundai.

On April 30, 1999, the M/V Hyundai Liberty filed a Motion to Dismiss for improper venue; i.e., seeking to enforce the forum selection clause. Kukje filed its opposition on May 10, 1999. On May 17, 1999, the M/V Hyundai Liberty filed its Reply. Co-defendant Glory Express has neither joined, nor opposed, the M/V Hyundai Liberty's motion.

In addition, on April 30, 1999, Hyundai brought a Motion to Dismiss the Glory Express Third Party Complaint for Indemnification, also seeking to enforce the forum selection clause in the Hyundai Bill of Lading. Glory Express has not opposed this motion.

II. [*sic*] DISCUSSION

A. Kukje's Argument That "A Motion to Dismiss for Improper Venue Will Not Lie in Admiralty"

Kukje devotes nearly eight pages of its opposition to the argument that (1) *in the absence of a binding, contractual forum selection clause*, venue would be proper in the Central District of California, and (2) the instant motion should be strictly construed as a motion to enforce a contractual forum selection clause, rather than a motion to transfer venue "[f]or the convenience of parties and witnesses" and "in the interest of justice," as provided by 28 U.S.C. § 1404(a). Neither the Court, nor the M/V Hyundai Liberty, appear to have any quarrel with these contentions. *See* Df.'s Reply at 2:10-21.

B. Kukje's Evidentiary Objection to the Admissibility of the Hyundai Bill of Lading

As a threshold matter, the Court sustains Kukje's objection to the lack of authentication of the Hyundai Bill of Lading. Federal Rule of Evidence 901 ("Requirement of Authentication or Identification") provides as follows:

> (a) General provision. – The requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

"When a witness was present at the signing of a document, for example, or when the witness actually signed the document, he or she can testify to the authenticity of a writing purporting to be that which he or she witnessed or signed." 5 Weinstein's Federal Evidence § 901.03[1] (2d ed. 1999) (citing *United States v. Knigge*, 832 F.2d 1100, 1108 (9th Cir. 1987)).

Here, the M/V Hyundai Liberty offers the declaration of Masoud Barzin, Hyundai's General Counsel, who purports to have "personal knowledge" of the following fact:

> Attached hereto as Exhibit A is a true and correct copy of Hyundai Bill of Lading No. HDMU BUCA222928 dated November 28, 1997. The original will be available to the Court on the day this Motion is heard.

Masoud Decl. ¶¶ 1-2. Although Barzin may testify that Exhibit A is a copy of a document in his possession, which he refers to as the "original," he has no personal knowledge that the "original" in his possession is the same document signed in Korea. Barzin does not state that he is a signatory to the original or that he was present when the original was signed. Nor does he even attempt to describe the chain of custody that resulted in his possession of the original. In sustaining Kukje's objection, the Court is not implying that the *only* way to authenticate the bill of lading is through the declaration of one who was present when the bill was signed. In the absence of *evidence* raising an issue as to authenticity, a lesser showing could potentially "suffic[e] to support a finding" that the "original" is the same document signed and issued in Korea. However, the conclusory declaration of a party's current in-house counsel is insufficient to satsify [*sic*] the M/V Hyundai Liberty's burden of authentication.

C. Although Doosan Is a "Merchant" for Purposes of the Bill of Lading, Neither Doosan Nor Kukje Have "Accepted" the Bill of Lading, and Therefore It Does Not Bind Kukje

1. Doosan Is a "Merchant" For Purposes of the Hyundai Bill of Lading

Even assuming the Hyundai Bill of Lading had been properly authenticated, the M/V Hyundai Liberty has not established that Kukje is bound by its provisions, including the forum selection clause. Notably, the terms and definitions of the Hyundai Bill of Lading are virtually identical to those in the bill of lading at issue in *All Pacific Trading Co. v. M/V Hanjin Yosu*, 7 F.3d 1427 (9th Cir. 1993). Both the Hyundai Bill of Lading and the one at issue in *All Pacific* define "Merchant" to include, *inter alia*, the "owner . . . of the Goods"; i.e., Doosan. Moreover, the Ninth Circuit's description of the bill of lading at issue in *All Pacific* is equally applicable here:

> The . . . bills of lading do not name any individual parties as the Merchant. The bills of lading include blanks for the names of the shipper, the exporter, the consignee, the "notify parties," the forwarding agent references, and the vessel, but no blank for either the Merchant or for the owner of the goods. Thus, the only definition of Merchant included on the bills of lading is the contract definition quoted above. The failure to specifically identify a particular party as Merchant is particularly noteworthy given the fact that the bill of lading goes on to use the term Merchant approximately seventy-seven times.

Id. at 1432. The Ninth Circuit emphasized that "because the bills of lading [did] not name any particular parties as Merchants," the "contract definition of Merchant on the

reverse of the bills of lading" was controlling, and that therefore "the owners of the goods [were] parties to the bills of lading as Merchants." *Id.*

This reasoning applies equally well to the instant action. Because the Hyundai Bill of Lading fails to identify a particular party as "Merchant," the contract definition of "Merchant," which includes the "owner . . . of the Goods," controls. Therefore, Doosan is a named party to the Hyundai Bill of Lading.

The Court acknowledges that the instant action differs from *All Pacific* in one material respect. In *All Pacific*, the plaintiff-owner argued that it *was* a named party to the bill of lading issued by the defendant-carrier. Here, in contrast, Kukje is arguing that Doosan is *not* a named party to the Hyundai Bill of Lading because Kukje wants to avoid the forum selection clause. The distinction is relevant because, as noted in *All Pacific*, "[b]ills of lading are contracts of adhesion, usually drafted by the carrier, and are therefore 'strictly construed against th carrier.'" *Id.* at 1431 (quotation omitted). Therefore, "[a]ny ambiguity in the bill of lading must be construed in favor of the shipper and against the carrier." *Id.* (quotation omitted). In *All Pacific*, the Ninth Circuit's conclusion that the plaintiff-owner was a "Merchant" was a construction favorable to the shipper. In contrast, the same construction applied herein would inure to the benefit of the carrier, Hyundai, which presumably drafted the bill of lading at issue. However, the rule that contracts of adhesion must be construed against the drafter only applies if, in fact, there is an *ambiguity* in the contract language. *See id.* The *All Pacific* opinion emphasized, however, that the "*plain language* of the . . . bills of lading establish that the [ ] cargo owners were Merchants." *Id.* at 1432-33. Although

the Ninth Circuit went on to comment that "[e]ven were we to view the definition of Merchant as an ambiguous term, we would construe this ambiguity against the carrier," this statement is dictum in light of the court's initial conclusion that the definition of Merchant was *not* ambiguous, but rather flowed from the "plain language" of the bill of lading. Because the definition of "Merchant" is not ambiguous, the rule of construction governing contracts of adhesion does not mandate a departure from the holding in *All Pacific*.

2. Although Doosan Is a "Merchant," and Therefore a Named Party to the Hyundai Bill of Lading, Neither Doosan nor Kukje Has "Accepted" the Contract

As discussed in *All Pacific*, the fact that Doosan is a "Merchant" for purposes of the Hyundai Bill of Lading does not bind Doosan to the contract unless either Doosan or Kukje has taken "action demonstrating acceptance of the bill[] of lading." *Id.* at 1432; *see Mitsui O.S.K. Lines, Ltd. v. Dynasea Corp.*, ___ Cal. App. 4th ___, 1999 WL 312401, at *5 (April 19, 1999) (definition of "Merchant" in bill of lading cannot bind non-signatory unless that party "accepts" the obligation). In *All Pacific*, the Ninth Circuit held that the plaintiffs therein "accepted" the bill of lading by filing suit for a direct breach of its terms. As noted above, the posture of the instant action is reversed. Here, Kukje contends it is *not* bringing suit "under the Hyundai [B]ill of [L]ading." Opp. at 17:15-19. As support for this contention, Kukje argues that

> [t]he complaint does not mention the Hyundai bill of lading, nor does it mention Hyundai, far less join Hyundai as a defendant. . . . [Kukje] has

> not filed suit on the Hyundai bill of lading, and Hyundai's bill can not be enforced against [Kukje].

Opp. at 17:19-28. As noted above, Kukje's Complaint alleges the following causes of action against the M/V Hyundai Liberty (*in rem*) and Glory Express (*in personam*): (1) damage to cargo; (2) breach of contract; (3) negligence; (4) breach of duty to care for property in bailment; and (5) unseaworthiness. The allegations of the first cause of action, which are incorporated by reference into the remaining causes of action, state that

> on or about November 25, 1997, at Busan, South Korea, defendants, and each of them, entered into contracts of affreightment, which are evidenced by a number of bills of lading, including, but not necessarily limited to, bills of lading numbers NAMS97-11117; NAMS97-11118; and NAMS97-11119; and thereafter received cargo consisting of Doosan [merchandise] . . . for carriage on board the M/V HYUNDAI LIBERTY, Voyage 015E, from Busan, South Korea, to Los Angeles, California.
>
> . . .
>
> [Kukje] alleges that defendants, and each of them, failed and neglected to discharge and deliver the Cargo pursuant to the applicable bills of lading, contracts of affreightment, and/or freight bills. . . . "

Compl. ¶ 6, 8. In its opposition, Kukje does not describe the nature of the "NAMS" bills of lading referenced in the Complaint. Presumably, these are either the bills Streamline issued to Glory Express, or the bills Glory Express issued to Doosan. In any event, Kukje contends that the reference to the "NAMS" bills is *not* a reference to the

Hyundai Bill of Lading, and that Kukje is not suing under that bill. As "master of its own complaint" a plaintiff is entitled to decide under which contracts it brings suit. Because Kukje's Complaint does not on its face purport to bring suit under the Hyundai Bill of Lading, and Kukje argues herein that it "has not filed suit on the Hyundai bill of lading," the Court will defer to Kukje on this issue. *See* Opp. at 17:26-28.

However, it is not obvious to the Court that Kukje can state a viable cause of action against the M/V Hyundai Liberty *without* affirming and accepting the terms of the Hyundai Bill of Lading. In *All Pacific*, for example, it appeared that the plaintiff-shipper *needed* to accept the bill of lading at issue in order to state a breach of contract action against the defendant-carrier. *See id.* at 1431-32. As a general proposition, the Court is skeptical that Kukje can "avoid" the forum selection clause by attempting to transform a conventional breach of contract action into a non-contractual action in tort, or by contending that the M/V Hyundai Liberty breached a contract other than the Hyundai Bill of Lading. Whether Kukje *needs* to accept the contract to maintain its claims against the M/V Hyundai Liberty is, of course, not an issue before the Court today. However, if during the course of this litigation Kukje "accepts" the Hyundai Bill of Lading by, for example, relying on its terms to establish an element of its claims, the Court would entertain a renewed motion to enforce the forum selection clause contained therein.[1]

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[1] In its Reply brief, the M/V Hyundai Liberty quotes *Carmen [sic] Tool & Abrassives, [sic] Inc. v. Evergreen Lines*, 871 F.2d 897, 901 (9th Cir. 1989) for the proposition that "[p]arties who do not deal with the

(Continued on following page)

D. Hyundai's Motion to Dismiss Third-Party Complaint

The Court has received no opposition to Hyundai's motion to be dismissed from the Glory Express Third-Party Complaint. Accordingly, it is hereby ORDERED that Hyundai's Motion to Dismiss is GRANTED.

SO ORDERED.

DATED: May 24, 1999

AUDREY COLLINS
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

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carrier directly have a responsibility to obtain a copy of the bill of lading if they have an interest in knowing its terms. We decline to place on the carrier the burden of tracking down these remote parties. . . ." As in *All Pacific*, the plaintiff-shipper in *Carmen [sic] Tools* "accepted" the bill of lading at issue by suing directly for breach of the bill. *See id.* at 899. Accordingly, *Carmen [sic] Tools* is consistent with the Court's holding herein.

APPENDIX D

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KUKJE HWAJAE INSURANCE COMPANY, LTD., Plaintiff, v. THE M/V HYUNDAI LIBERTY (*in rem*), GLORY EXPRESS, INC. (*in personam*), Defendants.	CASE NO.: CV 98-9217 ABC (RZx) **AMENDED** ORDER RE: DEFENDANT M/V HYUNDAI LIBERTY'S MOTION TO RECONSIDER [Reissued on August 3, 1999, to correct typographical errors only] (Filed Aug. 3, 1999)
GLORY EXPRESS, INC., Third-Party Plaintiff, v. STREAMLINE SHIPPERS ASSOCIATION, HYUNDAI MERCHANT MARINE COMPANY, LTD., Third-Party Defendants.	

After reviewing the materials submitted by the parties and the case file, it is hereby ORDERED that Defendant the M/V Hyundai Liberty's Motion to Reconsider, and application for certificate of appealability, are DENIED.

I. FACTUAL BACKGROUND

This action arises from the ocean carriage of cargo from Busan, Korea to Long Beach, California aboard the defendant vessel, the M/V Hyundai Liberty ("Defendant"). The cargo was ultimately delivered in a "severely damaged condition." Compl. ¶ 8.

The cargo at issue was originally consigned to Doosan Corporation, Doosan America Corporation, and Doosan Machinery USA Inc. (collectively "Doosan"). Compl. ¶ 2. Plaintiff Kukje Hwaje [*sic*] Insurance Co. ("Kukje") is Doosan's subrogated insurer. Kukje alleges that it reimbursed Doosan for damage to the cargo, and that therefore Kukje has been subrogated to Doosan's right to recover from third parties.

Doosan contracted with Defendant and Third-Party Plaintiff Glory Express, Inc. ("Glory Express") to transport the cargo from Korea to California. Although it is not clear from either the pleadings or the motion papers, it appears that Glory Express subsequently contracted with Third-Party Defendant Streamline Shippers Association Inc. ("Streamline"), a California based non-vessel-operating common carrier, which in turn contracted with Third-Party Defendant Hyundai Merchant Marine Co., Ltd. ("Hyundai"), the owners and operators of *in rem* Defendant the M/V Hyundai Liberty. The cargo was eventually shipped pursuant to a Hyundai bill of lading that lists Streamline as the "shipper," "consignee," and "notify party." (the "Hyundai Bill of Lading"). *See* Mot., Exh. A. The Hyundai Bill of Lading does not, however, specifically name either Doosan, Kukje, or Glory Express as a named party. The bill of lading contains a forum selection clause, pursuant to which "all actions concerning custody or

carriage under the Bill of Lading whether based on breach of contract, tort or otherwise shall be brought in [Korea]."

II. PROCEDURAL BACKGROUND

On November 16, 1998, Kukje filed a complaint, in admiralty, asserting causes of action for (1) damage to cargo; (2) breach of contract; (3) negligence; (4) breach of duty to care for property in bailment; and (5) unseaworthiness. The action was brought *in rem* against Defendant the M/V Hyundai Liberty, and *in personam* against Glory Express. On February 26, 1999, Glory Express filed a Third Party Complaint for Indemnification against Streamline and Hyundai.

On April 30, 1999, the M/V Hyundai Liberty filed a Motion to Dismiss for improper venue; i.e., seeking to enforce the forum selection clause.[1] By Order signed May 24, 1999, the Court denied this motion. Specifically, the Court: (1) sustained Kukje's evidentiary objection to the admissibility of the Hyundai Bill of Lading on the grounds that the declaration of Hyundai's general counsel was insufficient to authenticate the document as a true and correct copy of the original; (2) concluded that Doosan (and by subrogation, Kukje), fell within the definition of the term "Merchant," as used in the Bill of Lading; and (3) concluded that neither Doosan nor Kukje were bound by the forum selection clause in the Hyundai Bill of Lading because neither had taken "action demonstrating acceptance" of the bill. As to the absence of "acceptance," the

[1] Co-defendant Glory Express neither joined, nor opposed, the M/V Hyundai Liberty's motion.

Court noted that a party can accept a contract by suing to enforce its provisions, but that Kukje's complaint did not refer to the Hyundai Bill of Lading, and that Kukje expressly denies that it is suing to enforce it. Although the Court expressed skepticism that Kukje could prevail on its lawsuit *without* accepting the Hyundai Bill of Lading, the Court nevertheless concluded that Kukje had not, as yet, "accepted" the bill.

On May 28, 1999, the M/V Hyundai Liberty filed the instant Motion for Reconsideration of the Court's May 24, 1999 Order. Kukje filed an opposition on June 7, 1999. On June 14, 1999, the M/V Hyundai Liberty filed its reply.

II. [*sic*] DISCUSSION

A. Standard

Motions for Reconsideration are governed by Rule 7.16 of the Local Civil Rules of the Central District of California. Local Rule 7.16 provides:

> A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any matter repeat any oral or written argument

> made in support of or in opposition to the original motion.

Local Rule 7.16.

B. Analysis

Defendant's motion for reconsideration fails on three grounds. First, Defendants motion fails to address the evidentiary issue – authentication – which was an independent grounds [*sic*] for the denial of the motion to dismiss. The failure to address this issue alone constitutes grounds to deny the motion to reconsider.[2]

Second, Defendant's motion is based on the identical legal precedent raised and argued in the prior motion to dismiss. In violation of the local rules, Defendant's motion simply "repeat[s] . . . argument made in support of . . . the original motion."[3]

Even assuming, arguendo, that Defendant's arguments regarding "acceptance" had not been previously raised, the Court remains unpersuaded that its prior ruling was erroneous. Defendant erroneously concludes that the "only case relied upon by the court for its holding

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[2] However, the Court acknowledges that this evidentiary deficiency can be readily cured in the future, and that therefore Defendant has a meaningful interest in the Court's substantive ruling regarding "acceptance." Therefore, the Court will address this aspect of the motion to reconsider.

[3] The Court finds that Defendant's motion is in clear violation of Local Rule 7.16. Although Kukje has not requested sanctions, the Court warns Defendant that any future violation of the Local Rules may result in court-imposed sanctions.

that [Doosan] never 'accepted' the terms of the Hyundai Bill of Lading is a state court case," *Mitsui O.S.K. Lines, Ltd. v. DYNASEA Corp.*, ___ Cal. App. 4th ___, 1999 WL 312401 (Apr. 19, 1999), a copy of which Kukje's counsel delivered to chambers on May 21, 1999, the Friday before oral argument.[4] Defendant suggests that by citing to *Mitsui*, the Court erroneously applied state law rather than federal maritime law. However, Defendant's argument ignores the language in *All Pacific Trading Co. v. Vessel M/V Hanjin Yosu,* 7 F.3d 1427, 1433 (9th Cir. 1993), which the Court discussed at length in its prior order. *All Pacific,* a *federal* decision applying *federal* maritime law, expressly held that "like all contracts,. . . . bills of lading require some form of acceptance." *Id.* at 1432. The Ninth Circuit went on to hold that, by bringing suit to enforce the bill's provisions, the plaintiffs had "accepted" it for purposes of creating a binding contract. *Id.* ("as a basic rule of contract interpretation, a party may accept a contract by filing suit on the contract") (citing 17A Am.Jur.2d Contracts § 456). Thus, Defendant is simply incorrect in concluding that the Court relied "solely" on state law.

Similarly unpersuasive is Defendant's citation to *Fireman's Fund Ins. Co. v. M/V DSR Atlantic,* 131 F.3d 1336 (9th Cir. 1998), a case Defendant describes as "seemingly identical" to the facts of the instant action. Df.'s Mot. at 5:1-2. In contrast to the case at bar, the forum selection

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[4] Notably, the Court had drafted its tentative order prior to May 21, 1999, the date the *Mitsui* opinion was delivered to chambers. Upon reviewing *Mitsui*, and concluding that it supported the Court's tentative, the Court added a citation to the case.

clause at issue in *Fireman's Fund* was enforced against the plaintiff, a non-signatory to the bill of lading, *who brought "suit on [the] bill of lading." See Fireman's Fund*, 1995 WL 871840, at *1 n.1 (N.D.Cal. Dec. 1, 1995), *rev'd on other grounds*, 131 F.3d 1336 (9th Cir. 1995 [1998]). In contrast, Kukje contends it is not bringing suit on the bill of lading. Rather than being "identical" to the instant action, *Fireman's Fund* is distinguishable for the very reason discussed in the Court's prior order.

C. Defendant's Request for Clarification

Defendant seeks clarification of what it perceives as an "apparent inconsisten[cy]" in the Court's prior Order, in which the Court concluded that "Doosan is a named party to the Hyundai Bill of Lading," but that Doosan (and by subrogation, Kukje) was not bound by the bill of lading because Doosan had never accepted it. As Kukje recognizes in its opposition brief, the Court's prior holding with regard to this issue was for the purpose of clarifying that Doosan was a "party named in the Hyundai Bill of Lading" in the sense that Doosan fell within the definition of "Merchant," as that term was defined in the Bill. By referring to Doosan as a "party," however, the Court did not intend to infer that Doosan was contractually bound to the provisions of the bill of lading. Although Hyundai could conceivably define the term "Merchant" to include entire classes of business entities, those entities are not bound by the bill of lading until they somehow manifest "acceptance" of the bill, whether by bringing suit or otherwise. Thus, the Court is unpersuaded that its prior Order is inconsistent.

D. Defendant's Request for Certification of Appealability Pursuant to 28 U.S.C. § 1292(b)

In light of the foregoing discussion, the Court is not persuaded that Defendant has raised an issue of law "as to which there is substantial ground for difference of opinion." *See* 28 U.S.C. § 1292(b). Defendant's application for a certificate of appealability is DENIED.

IV. CONCLUSION

For the reasons articulated above, Defendant the M/V Hyundai Liberty's Motion to Reconsider, and application for certificate of appealability, are DENIED.

SO ORDERED.

DATED: Aug. 3, 1999

AUDREY COLLINS
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

APPENDIX E

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KUKJE HWAJAE INSURANCE CO., LTD., a corporation,

Plaintiff-Appellant/
Cross-Appellee,

v.

The "M/V HYUNDAI LIBERTY," her Engines, Boilers, Tackle, etc., in rem,

Defendant-Appellee/
Cross-Appellant,

and

GLORY EXPRESS, INC., a business entity, in personam,

Defendant-Appellee.

GLORY EXPRESS, INC., a California Corporation,

Third-party plaintiff-
Appellee,

v.

STREAMLINE SHIPPERS ASSOCIATION, a California Corporation,

Third-party defendant,

and

HYUNDAI MERCHANT MARINE CO., LTD., a business entity, DOES 1-10, inclusive,

Third-party defendants-
Appellees.

Nos. 00-56970
00-57049

D.C. No.
CV-98-09217-ABC

ORDER

(Filed Jul. 22, 2002)

Before: GRABER, Circuit Judge.

Appellees are directed to file a response to Appellant's petition for rehearing filed July 10, 2002. The response shall not exceed 15 pages and shall be filed within 21 days of the filing date of this order.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KUKJE HWAJAE INSURANCE CO., LTD., a corporation, Plaintiff-Appellant/ Cross-Appellee, v. The "M/V HYUNDAI LIBERTY," her Engines, Boilers, Tackle, etc., in rem, Defendant-Appellee/ Cross-Appellant, and GLORY EXPRESS, INC., a business entity, in personam, Defendant-Appellee.	Nos. 00-56970 00-57049 D.C. No. CV-98-09217-ABC ORDER (Filed Aug. 28, 2002)
GLORY EXPRESS, INC., a California Corporation, Third-party plaintiff-Appellee, v. STREAMLINE SHIPPERS ASSOCIATION, a California Corporation, Third-party defendant, and HYUNDAI MERCHANT MARINE CO., LTD., a business entity, DOES 1-10, inclusive, Third-party defendants-Appellees.	

Before: BEEZER, TASHIMA, and GRABER, Circuit Judges.

The petition for rehearing is DENIED.

APPENDIX G

Shipping Act of 1984 § 3, 46 U.S.C. app. § 1702

§ 1702. Definitions

As used in this chapter –

. . .

(6) "common carrier" means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that –

(A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. . . .

. . .

(16) "ocean common carrier" means a vessel-operating common carrier.

(17) "ocean transportation intermediary" means an ocean freight forwarder or a non-vessel-operating common carrier. For purposes of this paragraph, the term –

(A) "ocean freight forwarder" means a person that –

(i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and

(ii) pocesses the documentation or performs related activities incident to those shipments; and

(B) "non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

. . .

(21) "shipper" means –

(A) a cargo owner;

(B) the person for whose account the ocean transportation is provided;

(C) the person to whom delivery is to be made;

(D) a shippers' association; or

(E) an ocean transportation intermediary, as defined in paragraph (17)(B) of this section, that accepts responsibility for payment of all charges applicable under the tariff or service contract.

(22) "shippers' association" means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

APPENDIX H

Shipping Act of 1984 § 8, 46 U.S.C. app. § 1707

§ 1707. Tariffs

(a) In general

(1) Except with regard to bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, and paper waste, each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. However, common carriers shall not be required to state separately or otherwise reveal in tariffs the inland divisions of a through rate. Tariffs shall –

(A) state the places between which cargo will be carried;

(B) list each classification of cargo in use;

(C) state the level of ocean transportation intermediary, as defined in section 1702(17)(A) of this Appendix, compensation, if any, by a carrier or conference;

(D) state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules or regulations that in any way change, affect, or determine any part or the aggregate of the rates or charges;

(E) include sample copies of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement; and

(F) include copies of any loyalty contract, omitting the shipper's name.

(2) Tariffs shall be made available electronically to any person, without time, quantity, or other limitation, through appropriate access from remote locations, and a reasonable charge may be assessed for such access. No charge may be assessed a Federal agency for such access.

. . .

APPENDIX I

Shipping Act of 1984 § 10, 46 U.S.C. app. § 1709

§ 1709. Prohibited acts

. . .

(b) Common carriers

No common carrier, either alone or in conjunction with any other person, directly or indirectly, may –

. . .

(11) knowingly and willfully accept cargo from or transport cargo for the account of an ocean transportation intermediary that does not have a tariff and a bond, insurance, or other surety as required by sections 1707 and 1718 of this Appendix;

(12) knowingly and willfully enter into a service contract with an ocean transportation intermediary that does not have a tariff and a bond, insurance, or other surety as required by sections 1707 and 1718 of this Appendix, or with an affiliate of such ocean transportation intermediary;

. . .

(d) Common carriers, ocean transportation intermediaries, and marine terminal operators

(1) No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

APPENDIX J

Shipping Act of 1984 § 19, 46 U.S.C. app. § 1718

§ 1718. Ocean transportation intermediaries

(a) License

No person in the United States may act as an ocean transportation intermediary unless that person holds a license issued by the Commission. The Commission shall issue an intermediary's license to any person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary.

(b) Financial responsibility

(1) No person may act as an ocean transportation intermediary unless that person furnishes a bond, proof of insurance, or other surety in a form and amount determined by the Commission to insure financial responsibility that is issued by a surety company found acceptable by the Secretary of the Treasury.

(2) A bond, insurance, or other surety obtained pursuant to this section –

(A) shall be available to pay any order for reparation issued pursuant to section 1710 or 1713 of this Appendix, or any penalty assessed pursuant to section 1712 of this Appendix;

(B) may be available to pay any claim against an ocean transportation intermediary arising from its transportation-related activities described in section 1702(17) of this Appendix with the consent of the insured ocean transportation intermediary and subject to review by the surety company, or when the claim is deemed valid

by the surety company after the ocean transportation intermediary has failed to respond to adequate notice to address the validity of the claim; and

(C) shall be available to pay any judgment for damages against an ocean transportation intermediary arising from its transportation-related activities under section 1702(17) of this Appendix, provided the claimant has first attempted to resolve the claim pursuant to subparagraph (B) of this paragraph and the claim has not been resolved within a reasonable period of time.

(3) The Commission shall prescribe regulations for the purpose of protecting the interests of claimants, ocean transportation intermediaries, and surety companies with respect to the process of pursuing claims against ocean transportation intermediary bonds, insurance, or sureties through court judgments. The regulations shall provide that a judgment for monetary damages may not be enforced except to the extent that the damages claimed arise from the transportation-related activities of the insured ocean transportation intermediary, as defined by the Commission.

(4) An ocean transportation intermediary not domiciled in the United States shall designate a resident agent in the United States for receipt of service of judicial and administrative process, including subpoenas.

(c) Suspension or revocation

The Commission shall, after notice and hearing, suspend of[1] revoke a license if it finds that the ocean transportation intermediary is not qualified to render intermediary services or that it willfully failed to comply with a provision of this chapter or with a lawful order, rule, or regulation of the Commission. The Commission may also revoke an intermediary's license for failure to maintain a bond, proof of insurance, or other surety in accordance with subsection (b)(1) of this section.

(d) Exception

A person whose primary business is the sale of merchandise may forward shipments of the merchandise for its own account without a license.

(e) Compensation of intermediaries by carriers

(1) A common carrier may compensate an ocean transportation intermediary, as defined in section 1702(17)(A) of this Appendix, in connection with a shipment dispatched on behalf of others only when the ocean transportation intermediary has certified in writing that it holds a valid license, if required by subsection (a) of this section, and has performed the following services:

(A) Engaged, booked, secured, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of that space.

(B) Prepared and processed the ocean bill of lading, dock receipt, or other similar document with respect to the shipment.

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[1] So in original. Probably should be "or".

(2) No common carrier may pay compensation for services described in paragraph (1) more than once on the same shipment.

(3) No ocean transportation intermediary may receive compensation from a common carrier with respect to a shipment in which the intermediary has a direct or indirect beneficial interest nor shall a common carrier knowingly pay compensation on that shipment.

(4) No conference or group of 2 or more ocean common carriers in the foreign commerce of the United States that is authorized to agree upon the level of compensation paid to an ocean transportation intermediary, as defined in section 1702(17)(A) of this Appendix, may –

(A) deny to any member of the conference or group the right, upon notice of not more than 5 calendar days, to take independent action on any level of compensation paid to an ocean transportation intermediary, as so defined; or

(B) agree to limit the payment of compensation to an ocean transportation intermediary, as so defined, to less than 1.25 percent of the aggregate of all rates and charges which are applicable under a tariff and which are assessed against the cargo on which the intermediary services are provided.

APPENDIX K

S. Rep. No. 420, 101st Cong., 2nd Sess. 1990, 1990 WL 201672 (Leg.Hist.)

P.L. 101-595, FEDERAL MARITIME COMMISSION AUTHORIZATION

SENATE REPORT NO. 101-420
August 2, 1990
[To accompany S. 2759]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2759) to authorize appropriations for fiscal year 1991 for the Federal Maritime Commission, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE OF THE LEGISLATION

This bill authorizes appropriations for the continuation of programs administered by the Federal Maritime Commission (FMC) for fiscal year (FY) 1991; extends the date of filing the final report of the Advisory Commission on Conferences in Ocean Shipping; and strengthens the FMC's authority to correct unfair trade practices in our waterborne foreign commerce. The bill also authorizes issuance of certificates of documentation for the vessels Cherokee V, Ernestina, and Salisa M.

BACKGROUND AND NEEDS

FMC AUTHORIZATION AND RESPONSIBILITIES

The bill, as reported, authorizes the appropriation for FY 1991 of $15,894,000 for the FMC. The FMC is an

independent regulatory agency that administers: the Shipping Act, 1916; the Merchant Marine Act, 1920; the Intercoastal Shipping Act, 1933; the Shipping Act of 1984; the Foreign Shipping Practices Act of 1988; and related shipping statutes. The FMC's major responsibilities include: the review of tariff filings and service contracts; investigation and adjudication of penalties for discriminatory rates or practices among shippers, carriers, and terminal operators operating in the U.S. ocean commerce; licensing of independent ocean freight forwarders; passenger vessel certification; and countering against the actions of foreign carriers or governments that create unfavorable conditions in U.S. foreign ocean trades. The FMC does not regulate international ocean transportation rates, but does apppove rates for waterborne transportation between domestic ports and domestic offshore ports such as Hawaii and Puerto Rico. Since 1975, the FMC has been limited within its authorization to $1,500 for official reception and representation expenses. The bill, as reported, increases this allowable expenditure to $2,000.

THE ADVISORY COMMISSION ON CONFERENCES IN OCEAN SHIPPING

The Shipping Act of 1984 established the Advisory Commission on Conferences in Ocean Shipping, effective October 20, 1989. It further required that the final report of the Advisory Commission be submitted to the President and Congress within one year after its establishment. Since the full membership of the Advisory Commission has not been appointed, it is necessary to extend the date for the submission of the Advisory Commission's final report. The bill, as amended, extends the time period within

which the Advisory Commission is to issue its report to the President and Congress on its findings.

FMC AUTHORITY WITH RESPECT TO UNFAIR TRADE PRACTICES

Section 19 of the Merchant Marine Act, 1920, empowers the FMC to make rules to meet general or special conditions unfavorable to shipping when those conditions result either from foreign laws, rules, or regulations or from the actions of a foreign shipping line or its agent. The FMC is also authorized to request the head of any department, board, or agency of the U.S. Government to suspend, modify, or [sic] annual rules that affect shipping in the foreign trade.

The FMC uses this authority to investigate unfair maritime trade practices. If the FMC finds a practice of a foreign government, foreign operator, or group of foreign operators harmful to U.S. shipping, it can suspend the tariffs of the carrier flying the flag of the nation engaged in the harmful action.

On various occasions these statutory provisions have been inadequate to eliminate unfair practices. The two principal problems hindering the FMC in section 19 proceedings are the absence of (1) specific authority to obtain information for a complete investigation, and (2) sanctions (other than tariff suspension) that can be imposed on offending operators. More efficient and effective enforcement under section 19 can be accomplished by clarification that the section applies to bulk as well as liner operators; the granting of authority for shippers, third-flag carriers, and others to seek commencement of a section 19 investigation; and clarification that the FMC may examine

intermodal movements, terminal operations, and other shipping-related activities. The bill, as reported, specifically includes intermodal movements and certain land-based activities within the scope of section 19 of the Merchant Marine Act, 1920; specifies those persons or entities who may seek section 19 relief; empowers the FMC to use compulsory process in section 19 investigations; and authorizes a broader range of remedies to correct unfair foreign practices.

. . .

LEGISLATIVE HISTORY

The Merchant Marine Subcommittee held a hearing on June 20, 1990, to consider H.R. 4009, the FMC authorization bill approved by the House of Representatives on April 3, 1990, and referred to the Committee. S. 2759 was introduced by Senator Breaux on June 27, 1990 and is cosponsored by Senator Lott. On June 27, 1990, in open executive session the Committee considered and, without objection, ordered reported [sic] favorably an amendment in the nature of a substitute to S. 2759.

SUMMARY OF MAJOR PROVISIONS

The legislation authorizes $15,894,000 for the FMC in FY 1991. It also increases the allowable expenditure for official reception and representation expenses for the FMC to $2000. In addition, the legislation extends the time period within which the Advisory Commission on Conferences in Ocean Shipping is to issue its report to the President and Congress on its findings to one year from the date that all of the members of the Advisory Commission have been appointed.

With respect to unfair trade practices, the legislation amends section 19 of the Merchant Marine Act, 1920 (46 App. U.S.C. 876), to strengthen the FMC's authority to address and correct unfair conditions and practices unfavorable to shipping in our foreign commerce. The bill clarifies who may petition the FMC for relief against unfair trade practices and codifies existing FMC regulations providing that any person, including a common carrier, tramp operator, bulk operator, shipper, shippers' association, ocean freight forwarder, marine terminal operator, or any component of the government of the United States, may file a petition for relief.

The bill also strengthens the FMC's authority in a rulemaking investigation to obtain needed information by compulsory process, including written reports, subpoena, or other judicial procedures. The bill provides additional remedies for the FMC to use if it finds evidence of unfavorable shipping conditions. The legislation also clarifies that the FMC's current rulemaking and investigating powers include intermodal movements, terminal operations, cargo solicitation, forwarding and agency services, non-vessel operating common carrier operations, and all other activities integral to total transportation systems. Finally, the legislation grants a legislative waiver to permit the Coast Guard to issue appropriate coastwise trading and U.S. fisheries documents for the vessels Cherokee V, Ernestina, and Salisa M. Waivers for these vessels were passed by the House as part of H.R. 4009. . . .

APPENDIX L

67 Fed. Reg. 66318

RULES and REGULATIONS

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 4, 113 and 178

[T.D. 02-62]

RIN 1515-AD11

Presentation of Vessel Cargo Declaration to Customs Before Cargo Is Laden Aboard Vessel at Foreign Port for Transport to the United States

Thursday, October 31, 2002

AGENCY: Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to require the advance and accurate presentation of certain manifest information prior to lading at the foreign port and to encourage the presentation of this information electronically. The document also allows a non-vessel operating common carrier (NVOCC) having an International Carrier Bond to electronically present cargo manifest information to Customs. This information is required in advance and is urgently needed in order to enable Customs to evaluate the risk of smuggling weapons of mass destruction through the use of oceangoing cargo containers before goods are loaded on vessels for importation into the United States, while, at the same time, enabling Customs to facilitate the prompt release of legitimate cargo following its arrival in the United States. Failure to provide the required information in the time

period prescribed may result in the delay of a permit to unlade and/or the assessment of civil monetary penalties or claims for liquidated damages.

EFFECTIVE DATE: December 2, 2002.

. . .

SUPPLEMENTARY INFORMATION:

Background

The Customs laws impose certain requirements upon vessels that will arrive in the United States to discharge their cargo. In particular, vessels destined for the United States must comply with 19 U.S.C. 1431, which requires that every vessel bound for the United States and required to make entry under 19 U.S.C. 1434 have a manifest that meets the requirements that are prescribed by regulation. To this end, under 19 U.S.C. 1431(d), Customs may by regulation specify the form for, and the information and data that must be contained in, the vessel manifest, as well as the manner of production for, and the delivery or electronic transmittal of, the vessel manifest.

Currently, § 4.7, Customs Regulations (19 CFR 4.7), requires: That the master of every vessel arriving in the United States and required to make entry have on board the vessel a manifest in accordance with 19 U.S.C. 1431 and § 4.7; and that an original and one copy of the manifest must be ready for production upon demand and must be delivered to the first Customs officer who demands the manifest. Sections 4.7(a) and 4.7a, Customs Regulations (19 CFR 4.7(a) and 4.7a), set forth the documentary and informational requirements that constitute the vessel manifest.

Pursuant to § 4.7(a), the cargo declaration (Customs Form 1302 or its electronic equivalent) is one of the documents that comprises a vessel manifest. The cargo declaration must list all the inward foreign cargo on board the vessel regardless of the intended U.S. port of discharge of the cargo (§ 4.7a(c)(1)). Furthermore, 19 U.S.C. 1448 provides, in pertinent part, that no merchandise may be unladen from a vessel which is required to make entry under section 1434 until Customs has issued a permit for its unlading. In addition, under section 1448, Customs possesses a reasonable measure of regulatory discretion as to whether, and under what circumstances and conditions, to issue a permit to unlade incoming cargo from a vessel arriving in the United States. Section 4.30, Customs Regulations (19 CFR 4.30), lists the requirements and conditions under which Customs may issue a permit to unlade foreign merchandise from a vessel arriving in the United States.

In addition, 19 U.S.C. 1436(a)(1) and (a)(4) provide that it is unlawful to fail to comply with sections 1431, 1433 or 1434 or any regulation prescribed under any of those statutory authorities. Moreover, 19 U.S.C. 1436(a)(2) states that it is unlawful to present or transmit, electronically or otherwise, any forged, altered or false document, paper, data or manifest to the Customs Service under 19 U.S.C. 1431, 1433(d) or 1434. Under section 1436(b), the master of a vessel who commits any such violation is liable for a civil penalty of $5,000 for the first violation and $10,000 for each subsequent violation and any conveyance used in connection with any such violation is subject to seizure and forfeiture.

Proposed Rulemaking; Advance Presentation of Vessel Cargo Manifest to Customs; Required Information

By a document published in the Federal Register (67 FR 51519) on August 8, 2002, Customs proposed to amend § 4.7 to provide that, pursuant to 19 U.S.C. 1431(d), for any vessel subject to entry under 19 U.S.C. 1434 upon its arrival in the United States, Customs must receive the vessel's cargo manifest (declaration) from the carrier 24 hours before the related cargo is laden aboard the vessel at the foreign port. The proposed rule also enumerated the specific informational elements that would need to be included in the submitted cargo manifest.

Necessity for Advance Presentation of Vessel Cargo Manifest to Customs

As explained in the preamble of the Notice of Proposed Rulemaking (67 FR at 51520), the United States Customs Service recently launched the Container Security Initiative ("CSI"). CSI will secure an indispensable, but vulnerable link in the chain of global trade: Containerized shipping. Approximately 90% of world cargo moves by container; 200 million cargo containers are transported between the world's seaports each year, constituting the most critical component of global trade. Nearly half of all incoming trade to the United States (by value) arrives by ship, and most of that is in sea containers. Annually, nearly 6 million cargo containers are offloaded at U.S. seaports. There is, however, virtually no security for this critical global trading system. And the consequences of a terrorist incident using a container would be profound. As experts like Dr. Stephen E. Flynn, Senior Fellow, Council on Foreign Relations, have pointed out repeatedly, if terrorists used a sea container to conceal a weapon of mass

destruction – a nuclear device, for example – and detonated it on arrival at a port, the impact on global trade and the global economy would be immediate and devastating. All nations would be affected because there would be no mechanism for identifying weapons of mass destruction before they reached our shores and before they posed a threat to the global economy.

Al Qaeda and other terrorist organizations pose an immediate and substantial threat. And the threat is not just to harm and kill American citizens, it is a threat to damage and destroy the U.S. and the world economy.

To address the threat terrorists pose to containerized shipping, Customs developed CSI. Under CSI, U.S. Customs is working with other governments to identify high-risk cargo containers and pre-screen those containers at the foreign ports before they are shipped to the U.S. CSI has four core elements:

(1) Identify "high-risk" containers. In connection with its domestic targeting efforts, Customs has already established criteria and automated targeting tools for identifying "high risk" shipments. Indeed, every one of the shipments that arrives in the United States by sea container is currently assessed for risk using these tools and advance manifest data. If this data were provided earlier, Customs could use these same tools to detect high risk shipments before they were carried to the United States. Accordingly, to enhance domestic targeting and to enable overseas targeting and screening of containers, Customs has proposed a rule requiring accurate and detailed information to be transmitted before shipments are laden on vessels destined for the United States.

(2) Pre-screen containers before they are shipped. As discussed above, to protect the United States and global trade from the risks posed by international terrorists, security screening should be done at the port of departure rather than the port of arrival.

(3) Use technology to screen high-risk containers. Technology enables screening to be done rapidly without slowing down the movement of trade. This technology includes large-scale x-ray and gamma machines and radiation detection devices.

(4) Use more secure containers to ensure the integrity of containers screened overseas. CSI thus offers real protection, on a day-to-day basis, for the primary system of international trade – a system on which all economies depend. Given the security afforded by CSI, the investments made by ports and members of the trade to implement CSI represent relatively inexpensive forms of insurance against the terrorist threat. In the event of an attack using a cargo container, the CSI network of ports will be able to remain operational because those ports will already have an effective security system in place – one that will deter and prevent terrorists from using it. Without such a network, the damage to global trade caused by a terrorist attack involving international shipping would be staggering.

In addition to protecting global trade, CSI should facilitate the flow of that trade. When a container has been prescreened and sealed under CSI, U.S. Customs will not, absent additional information affecting its risk analysis, need to inspect it for security purposes when it reaches the U.S. Moreover, this system could reduce the processing time for certain shipments because the screening at a CSI

port will in most cases take place during "down time." Most containers sit on a terminal for an average of several days prior to lading. This window of "down time" will be used to screen containers for security purposes. On arrival at the U.S. seaport, the CSI-screened container should be released immediately by U.S. Customs, which could shave hours, if not days, off of the shipping cycle. In this manner, CSI should increase the speed and predictability for the movement of cargo containers shipped to the U.S.

For these reasons, CSI is a critical component of the President's Homeland Security Strategy. It has also been endorsed by the G-8 as well as the World Customs Organization.

As a result of this broad support, CSI has been expanding rapidly. When Customs launched CSI this past January, the first step was to implement CSI as quickly as possible in Canada and the top 20 ports (by volume) that ship to the United States. When fully implemented in these locations, CSI will substantially increase the security of the United States and the global trading system because the top 20 ports alone account for nearly 70% of all the containers shipped to U.S. seaports. To date, Canada, the Netherlands, Belgium, France, Germany, Singapore, Hong Kong, and Japan have agreed to implement CSI. These countries represent 11 of the top 20 ports. Customs anticipates that several other nations will agree to implement CSI in the near term, and that CSI will expand beyond the top 20 ports during the next year.

CSI is already operational in Canada and the Netherlands. It will be implemented at several additional ports within the next 90 days. Given this explosive growth, it is critical that the information necessary to implement CSI

fully be provided to Customs in the near term. For this reason, Customs proposed this rulemaking on August 8, 2002 and, following the comment period, is issuing this final rule today.

Non-Vessel Operating Common Carriers (NVOCCs)

Under the proposed rule, the conditions of the International Carrier Bond (19 CFR 113.64) were proposed to be amended to recognize the status of a Non-Vessel Operating Common Carrier (NVOCC) as a manifesting party and to obligate any NVOCC having such a bond and electing to provide cargo manifest information to Customs electronically under § 4.7 and 4.7a to accurately transmit such information to Customs 24 or more hours before the related cargo is laden aboard the vessel at the foreign port. Breach of these obligations would result in liquidated damages against the NVOCC. For purposes of the proposed rule, a non-vessel operating common carrier (NVOCC) as a common carrier that does not operate the vessels by which the ocean transportation is provided, would be considered a shipper in its relationship with an ocean common carrier.

Penalties or Liquidated Damages for False or Untimely Filing of Manifest Data

If the master of a vessel failed to present or transmit accurate manifest data in the required time period or presented or transmitted any false, forged or altered document, paper, manifest or data to Customs, the proposed regulations specified that monetary penalties could be assessed under the provisions of 19 U.S.C. 1436(b). Likewise, if an NVOCC having an International Carrier

Bond elected to transmit such data electronically to Customs and failed to do so in the required time period or transmitted any false, forged or altered document, paper, manifest or data to Customs, the NVOCC could be liable for the payment of liquidated damages for breach of the conditions of the International Carrier Bond, in addition to any other applicable penalties.

Issuance of Permit To Unlade Cargo

The proposed rule also provided that if the carrier did not present cargo declaration information to Customs prior to the lading of the cargo aboard the vessel at the foreign port, Customs could, in addition to assessment of civil monetary penalties, delay issuance of a permit to unlade the entire vessel or a portion thereof until all required information was received.

Preliminary Entry

Finally, it was proposed that § 4.8 be amended to make clear that the granting of preliminary entry by Customs would be conditioned upon the electronic submission of the Cargo Declaration (Customs Form (CF) 1302), as well as the provision to Customs either electronically or in paper form of all other forms required by § 4.7.

. . .

[67 Fed. Reg. 66322]

Non Vessel Operating Common Carriers Eligible to Participate

Comment: In the August 8, 2002, proposed rule, Customs stated that Non Vessel Operating Common Carriers

(NVOCC) licensed by the Federal Maritime Commission (FMC) would be eligible to become bonded with Customs and to electronically transmit manifest information directly to Customs. Several commenters [sic] pointed out that a separate category of NVOCC is not licensed by the FMC, but rather is registered with the agency. This latter group, unless identified by Customs as eligible to participate, would be unable to transmit information directly to Customs prior to foreign lading. It is requested that Customs allow registered NVOCCs to participate. In addition, one commenter [sic] advocated that shippers' associations, like NVOCCs, should be authorized to present the required manifest information electronically to Customs.

Customs Response: Customs agrees that to the extent that members of the NVOCC community registered with the FMC become bonded with Customs, they should be included in the electronic filing program. Customs in this final rule has amended the proposed regulatory language in this regard to reflect this change. However, shippers' associations may not participate in the electronic filing program. Such associations of shippers are membership-only groups that are not currently regulated under U.S. law, and they are not licensed or registered with the FMC.

. . .

Bonds for Non Vessel Operating Common Carriers (NVOCCs)

Comment: One commenter [sic] stated that the proposal to amend provisions of the Customs International Carrier Bond as presently set forth in § 113.64 (19 CFR 113.64) would be inappropriate since an NVOCC did not actually transport merchandise. Concern was also expressed that

an NVOCC could be held accountable by Customs for delivery of cargo to an incorrect port of unlading by a carrier. Likewise, there was concern that an NVOCC could incur manifest violation penalties in instances where data was relayed to Customs by the NVOCC at least 24 hours in advance of scheduled vessel sailing time, but the vessel then loaded and departed earlier than scheduled.

Customs Response: It is the current practice that vessel agents in the United States carry continuous International Carrier Bond coverage (19 CFR 113.1). They, likewise, do not transport cargoes. They are bonded in order that Customs may be assured that the revenue is protected and that prompt satisfaction of any liabilities incurred in the course of their dealings with Customs may occur. Likewise, the NVOCC community will be dealing with Customs and will be required to provide the same level of assurance with respect to the correctness of the information they submit. Provided the NVOCC adequately demonstrates that cargo declaration information was timely submitted to Customs and the carrier then loaded the containers prematurely, the NVOCC will not be liable.

. . .

Customs Response: Customs may initiate penalty actions against any party responsible for providing the required information. For example, if a non-vessel operating common carrier (NVOCC) elects to participate in the vessel Automated Manifest System (AMS) and transmits its information directly to Customs, the NVOCC is the responsible party and will be held liable for any manifest information found to be untimely presented and/or containing errors or omissions. This would also be the case if the NVOCC manifested cargo and the cargo is left behind.

Timely communication between the vessel carrier and the NVOCC is required in order for the NVOCC to amend its manifest information to accurately list the cargo that is on board the vessel. Likewise, effective communication between the vessel carrier and the NVOCC is essential for changes to the ports of call and diversions of the vessel.

If an NVOCC is a participant in the vessel AMS program, the NVOCC will be treated as a carrier for Customs purposes. Vessel operators who currently slot charter to other vessel AMS carriers will utilize the same procedures for notification that the slot charterer has used in providing its manifest to Customs. A slot charterer is a carrier leasing space on a vessel owned or operated by another carrier on a space available basis. The vessel operator is only responsible for ensuring that the NVOCC's Standard Carrier Alpha Code (SCAC), as described in 19 CFR 4.7a(c)(2)(iii), is included on the Customs Form (CF) 3171 that is presented to Customs. Failure to present the SCAC of all NVOCCs and slot charterers on board the vessel will result in a penalty against the vessel carrier, under 19 U.S.C. 1436. . . .

APPENDIX M

46 C.F.R. § 510.2(*l*) (repealed)

"Nonvessel operating common carrier by water" is a common carrier by water as defined in section 1 of the Act, which does not operate the vessels by which its ocean transportation is provided but which holds itself out, by the establishment and maintenance of tariffs, by advertisement, solicitation, or otherwise, to provide transportation of property for hire by water in commerce from the United States; which assumes responsibility or has liability imposed by law for the safe transportation of such property; and which arranges in its own name for the performance of such transportation by underlying water carriers.

APPENDIX N

46 C.F.R. § 515.2(*l*)

(*l*) *Non-vessel-operating common carrier services* refers to the provision of transportation by water of cargo between the United States and a foreign county for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:

(1) purchasing transportation services from a VOCC and offering such services for resale to other persons;

(2) payment of port-to-port or multimodal transportation charges;

(3) entering into affreightment agreements with underlying shippers;

(4) issuing bills of lading or equivalent documents;

(5) arranging for inland transportation and paying for inland freight charges on through transportation movements;

(6) paying lawful compensation to ocean freight forwarders;

(7) leasing containers; or

(8) entering into arrangements with origin or destination agents.

Supreme Court, U.S.
FILED
JAN 24 2003
OFFICE OF THE CLERK

No. 02-813

IN THE

Supreme Court of the United States

GREEN FIRE & MARINE INSURANCE CO., LTD.,

Petitioner,

v.

M/V HYUNDAI LIBERTY, *in rem*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by Petitioner, one additional party should be mentioned. Glory Express, Inc. was a defendant/ appellee in the proceedings below. The claims against Glory Express were resolved by summary judgments by the district court, which found Glory Express liable to Petitioner, but also found that its liability was limited by the terms of the Glory Express bill of lading and the Carriage of Goods by Sea Act. Petitioner appealed the summary judgment limiting Glory Express' liability. On appeal, the Ninth Circuit affirmed the propriety of the summary judgment, finding that Glory Express was entitled to limit its liability. Petition, App. A at 15-16.

The M/V HYUNDAI LIBERTY is owned by Hyundai Merchant Marine, Co., Ltd., Seoul, Korea. The only company that owns 10% or more of Hyundai Merchant Marine, Co., Ltd.'s stock is Hyundai Elevator Co., Ltd.

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Respondent M/V HYUNDAI LIBERTY respectfully requests that this Court deny the petition for writ of certiorari filed by Green Fire & Marine Insurance Co., Ltd.

REASONS FOR DENYING THE PETITION

The question presented by the Petition is whether the court of appeals erred "in holding that NVOCCs are not shippers but, as a 'commercial norm,' are agents of the shipper when they contract for regulated transportation with ocean common carriers." Pet. at *i*. The question presented by Petitioner fails to accurately reflect the actual holding by the Ninth Circuit.

In its Petition, Petitioner expands the Ninth Circuit's holding, claiming that the court of appeals held the non-vessel-operating common carrier (NVOCC) with which Petitioner's subrogor contracted to ship the subject cargo "not" to be a "shipper" in relation to the ocean common carrier, Hyundai Merchant Marine Co., Ltd. (Hyundai), the owner of Respondent M/V HYUNDAI LIBERTY. In fact, the Ninth Circuit made no such finding. Rather, the Ninth Circuit, based on "the facts of this case" (Pet. App. 8) and on the commercial role of an NVOCC, found that the NVOCC was acting as an agent for Petitioner's subrogor when it accepted the carrier's bill of lading. The court of appeals did not hold that the NVOCC was not a shipper in its relationship with the ocean carrier. The parade of horribles envisioned by Petitioner, with claims such as the ruling widens "the judicial redefinition of the statutory role and status" of NVOCCs and "has the potential to frustrate the national maritime policy behind the regulation of NVOCCs' transactions with shippers and ocean common carriers,"[1] arises from a ruling

1. Petitioner even goes so far as to argue that the Ninth Circuit's holding could potentially result in weapons of mass destruction (Cont'd)

that Petitioner created, not from the opinion issued by the Ninth Circuit.

Neither the Ninth Circuit's actual ruling, nor the record below, raise the question presented by the Petition. The ruling is not in conflict with the Shipping Act of 1984 and the case has no far-reaching maritime statutory implications. Petitioner has distorted the ruling in an attempt to make a significant case out of a simple cargo damage case between a subrogated insurer, an NVOCC, and an ocean common carrier. The Ninth Circuit's holding is proper in all respects and Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

ARGUMENT

I.

NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTION PRESENTED BY THE PETITION

Contrary to the record, Petitioner states that there was no evidence that the NVOCC, Glory Express, Inc. (Glory Express), acted as the agent of Petitioner's subrogor, Doosan Corporation (Doosan), in procuring a vessel to carry Doosan's goods. (Pet. at 8.) However, ample evidence exists in the record to support the Ninth Circuit's finding that Glory

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(Cont'd)

reaching terrorists in this Country. Pet. at 21-22. The law referenced by Petitioner not only fails to lend any assistance to the Petition, but is also inappropriately cited since it was not in existence at the time the Ninth Circuit rendered its opinion. *See Miller v. Fairchild Industries*, 885 F.2d 498, 509 (9th Cir. 1989).

Express was acting as Doosan's agent when it made arrangements with the ocean carrier, Hyundai, to transport Doosan's cargo and accepted Hyundai's bill of lading issued in connection with the ocean transportation.

Agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1 (1958); *Grace Line, Inc. v. Todd Shipyards Corp.*, 500 F.2d 361, 373 (9th Cir. 1974). The existence of an agency relationship requires "a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent to so act." Restatement (Second) of Agency § 15 (1958). The authority of the agent may be created by express written agreement or other conduct of the principal. *See* Restatement (Second) of Agency § 26 (1958). An agency relationship may be proved "by circumstantial evidence, apparent relations, and the conduct of the parties." *Hoechst Celanese Corp. v. M/V TRIDENT AMBER*, 1992 WL 179219 *5, 1992 A.M.C. 2769, 2776 (S.D. Ga. 1992).

While the scope of agency is limited by the authority given by the principal, the agent nevertheless has the authority to perform acts which are incidental or necessary to the agent's performance of its duties. *See Lux Art Van Serv., Inc. v. Pollard*, 344 F.2d 883, 887 (9th Cir. 1965); Restatement (Second) of Agency § 35 (1958). The Restatement expressly contemplated the situation where an agent may exercise its incidental authority to enter into contracts for the principal:

> Unless otherwise agreed, authority to make a contract is inferred from authority to conduct a transaction, if the making of such a contract is

> incidental to the transaction, usually accompanies such a transaction, or is reasonably necessary to accomplish it.

Restatement (Second) of Agency § 50 (1958).

Petitioner's subrogor, Doosan, contracted with Glory Express to transport the cargo from Busan, Korea, to Los Angeles, California. (Pet. at 4). Glory Express issued three bills of lading to Doosan to cover the carriage. Each of Glory Express' bills of lading identifies Doosan as the shipper and the HYUNDAI LIBERTY as the "exporting Carrier." (Pet. App. 3) In carrying out its duties to Doosan, Glory Express, through Streamline Shippers Association of which it was a member, made arrangements with Hyundai for the actual ocean carriage. (Pet. App. 3; Pet. at 4-5).

The bills of lading between Glory Express and Doosan expressly provided that Glory Express would arrange for the carriage of the cargo on board the HYUNDAI LIBERTY. (Pet. App. 10). The Glory Express bills of lading further provided that Glory Express had the authority to use whatever form of transportation it thought was necessary to transport the goods. (Pet. App. 10-11).

Petitioner comments that there was no evidence that Doosan "needlessly duplicated its contract with Glory Express by additionally contracting with Hyundai Merchant Marine — which would have obligated Doosan to pay twice for shipping the goods once" (Pet. at 8), inferring that the Ninth Circuit held Glory Express to be Doosan's general agent. Again, this is not what the court of appeals held. In fact, the Ninth Circuit opinion specifically notes that it does "*not* mean to suggest that the relationship between Glory

Express and Doosan was one of agent and principal for all purposes." (Emphasis added). (Pet. App. 10, at note 5).

The Ninth Circuit's opinion is much less complex and far-reaching than Petitioner represents. The Panel held, simply, that for purposes of fulfilling its duties to Doosan, Glory Express had the duty and authority to ship the cargo on the HYUNDAI LIBERTY, which necessarily included the duty and authority to enter into contracts with other carriers to fulfill that obligation to Doosan. (Pet. App. 9). As this Court has previously held, it does "not grant a certiorari to review evidence and discuss particular facts." *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497 (1925).

II.

THE NINTH CIRCUIT'S RULING DOES NOT CONTRAVENE THE SHIPPING ACT OF 1984

In an attempt to attract this Court's attention, Petitioner alleges that the Ninth Circuit's ruling is directly at odds with the Shipping Act of 1984. This contention is without merit. Petitioner ignores the Ninth Circuit's opinion, in which the court of appeals expressly adopts the Act's definition of an NVOCC as "a shipper in its relationship with an ocean common carrier." (Pet. App. 8, quoting 46 U.S.C. app. § 1702(17)(B)). The opinion clearly distinguishes the court's findings concerning the relationship between the NVOCC and the shipper and the relationship between the NVOCC and the ocean carrier. Accordingly, the opinion does not conflict with the Shipping Act of 1984. Petitioner has undertaken to expand the scope of the ruling as a means to fashion a conflict with the Act in an attempt to overcome unfavorable holdings by both the district court and court of appeals.

III.

THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS BY OTHER CIRCUITS

Contrary to Petitioner's argument, the Ninth Circuit did not find "as a matter of law" (Pet. at 22) that an NVOCC is the "agent" of the shipper with whom it contracts. The Ninth Circuit found that "the commercial role of an NVOCC, as well as the facts of this case, lead to the conclusion that Glory Express was acting as Doosan's agent when it accepted the Hyundai bill of lading." (Pet. App. 8). The Ninth Circuit specifically stated:

> Nothing in the record suggests that the relationship between Doosan and Glory Express deviated from that commercial norm. To the contrary, the record shows that Doosan intended Glory Express to act as its agent for the purpose of shipping the lathe. [footnote stating that this agency was not "for all purposes."]

(Pet. App. 10).

While the Ninth Circuit opinion states that "in general" an NVOCC is considered to act as an agent for the cargo's owner (Pet. App. 11), the court of appeals relied throughout its opinion on the record below. Again, the Petition should not be granted because to do so would place this Court in a position of having to review evidence and discuss particular facts. *United States v. Johnston*, *supra*, 268 U.S. at 227, 45 S. Ct. at 497.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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(3)

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No. 02-813

In The

Supreme Court of the United States

GREEN FIRE & MARINE INSURANCE CO., LTD.,

Petitioner,

vs.

M/V HYUNDAI LIBERTY, *in rem*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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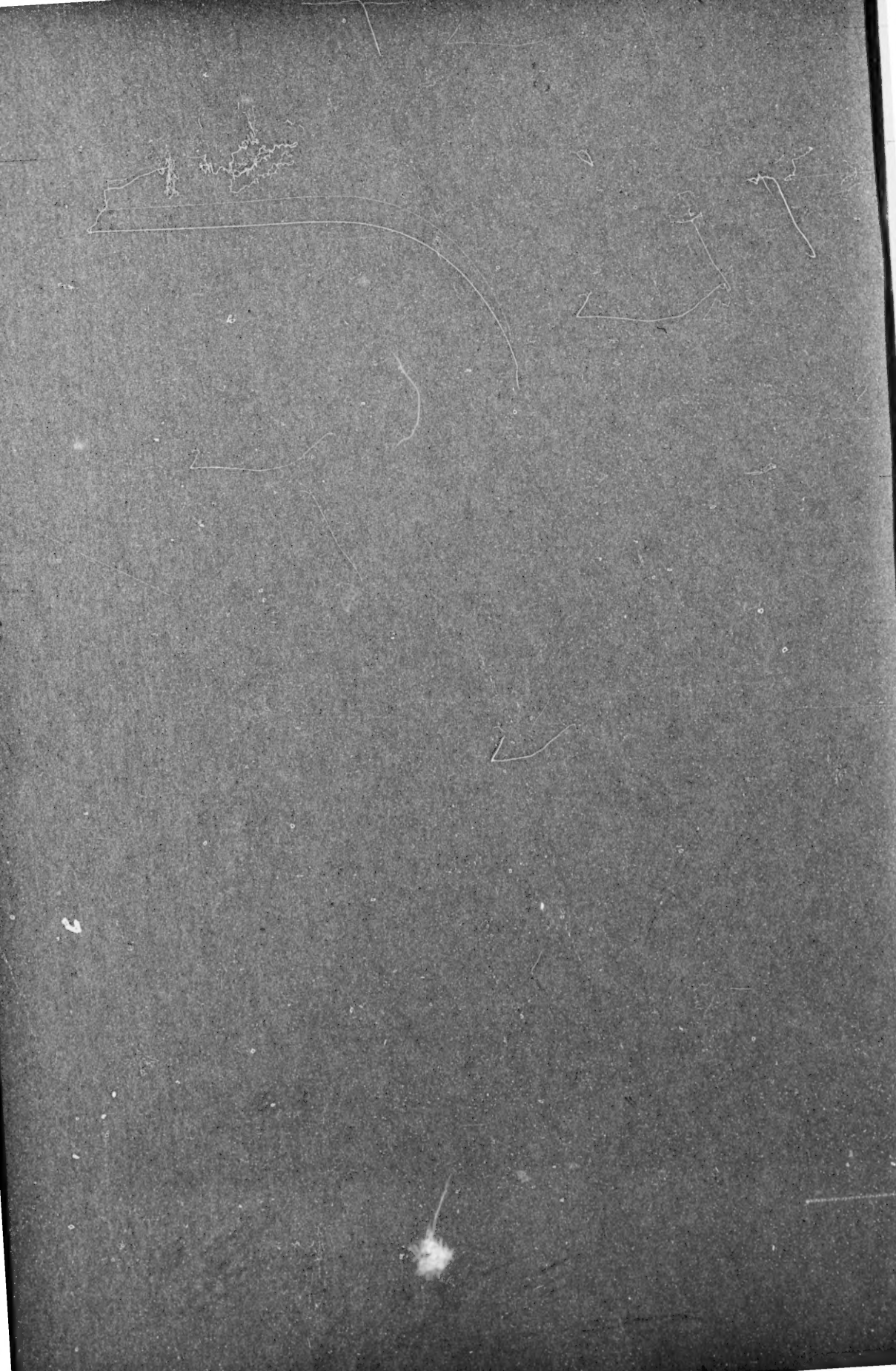

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

As permitted by S. Ct. R. 15.8, petitioner Green Fire & Marine Insurance Co., Ltd. respectfully files this supplemental brief in support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. The intervening matter not available at the time of petitioner's last filing is a petition for a writ of certiorari that was filed by Norfolk Southern Railway Company on January 6, 2003, and distributed for the Conference of February 21, 2003. *See Norfolk Southern R. Co. v. James N. Kirby Pty Ltd* No. 02-1028 (S. Ct. Jan. 6, 2003). In that petition, Norfolk Southern asks this Court to resolve the same circuit conflict petitioner described in its petition.

TWO PETITIONS ARGUING OPPOSITE SIDES OF THE CIRCUIT CONFLICT ARE NOW BEFORE THE COURT

Petitioner's petition advised this Court of a conflict in the circuits over the question whether a non-vessel-operating common carrier ("NVOCC"[1]) is a carrier in relation to the shipper with whom it contracts to provide ocean transportation or an agent of the shipper who binds the shipper to the contract it makes with a vessel-operating common carrier. *See* Pet. 22-28. Petitioner based

[1] The NVOCC is a creature of statute – the Shipping Act of 1984, 46 U.S.C. app. §§ 1701-1719. Its role and status are defined in section 3(17)(B), 46 U.S.C. app. § 1702(17)(B).

its assertion of a circuit conflict on the Eleventh Circuit's decision in *James N. Kirby Pty, Ltd. v. Norfolk Southern R. Co.*, 300 F.3d 1300 (11th Cir. 2002), *cert. pending*, No. 02-1028 (Jan. 6, 2003). In that case, the court of appeals held that a freight forwarder was not an agent of the shipper because it had assumed carrier liability by issuing a bill of lading for the carriage of goods on a vessel it did not operate. *See* Pet. 26-27.

Since the petition was filed, Norfolk Southern has petitioned this Court to review the Eleventh Circuit decision on which petitioner relies. These two petitions present the same question for review based on the same conflict in the circuits, but the two petitioners urge conflicting resolutions of this conflict.

The first question presented for review by Norfolk Southern's petition is essentially the same as the question petitioner presents. Petitioner framed the question as:

> Did the court of appeals err in holding that NVOCCs are not shippers but, as a "commercial norm," are agents of the shipper when they contract for regulated transportation with ocean common carriers?

Pet. i. In formulating its question, Norfolk Southern used the term "freight forwarder" rather than "NVOCC":

> Whether a cargo owner that contracts with a freight-forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.

Norfolk Southern, No. 02-1028, Pet. i.

In its "Statement of the Case," Norfolk Southern is more specific:

> [T]he Eleventh Circuit, in conflict with precedents of multiple courts of appeals and of this Court, has ruled that a freight forwarder that contracts with a cargo owner as a carrier is not the agent of the owner in contracting with vessel carriers to provide the actual transportation of the goods. Thus, under the decision below, the cargo owner is not bound by the terms of the bill of lading that the vessel carrier issues to the freight forwarder.

Id. at 2.

Although International Cargo Control Pty. Ltd. ("ICC") was nominally a freight forwarder,[2] the Eleventh Circuit correctly determined it was a carrier because it had assumed carrier liability under its own bill of lading. *See James N. Kirby*, 300 F.3d at 1305-07. As ICC did not operate the carrying vessel, it was a *non-vessel-operating* common carrier, a point Norfolk Southern urges in its petition: "ICC, like any freight forwarder issuing an FBL [a particular bill of lading form] and assuming liability as a carrier, is an NVOCC." *Norfolk Southern*, No. 02-1028, Pet. 15 n.4.

Norfolk Southern's petition argues that a freight forwarder acting as an NVOCC is an agent of the shipper and binds the shipper to its contracts with ocean common

---

[2] A freight forwarder is not a common carrier under the Shipping Act definition of the term. *See* Shipping Act § 3(17)(A), 46 U.S.C. app. § 1702(17)(A).

carriers. To support its view, Norfolk Southern relies on the Ninth Circuit's decision in petitioner's case, which it summarizes as follows:

> In *Kukje Hwajae Insurance Co. v. M/V Hyundai Liberty*, 294 F.3d 1171 (9th Cir. 2002), the Ninth Circuit held that the cargo owner was bound by the forum selection clause included in a bill of lading issued by the vessel carrier to a freight forwarder that (like ICC here) is a "non-vessel operating common carrier" ("NVOCC"), even though the cargo owner was not a party to that bill of lading, and even though the freight forwarder had issued separate bills of lading to the cargo owner. The Ninth Circuit held that the freight forwarder was "acting as [the cargo owner's] agent when it accepted the [vessel carrier's] bill of lading." *Id.* at 1175. The Ninth Circuit observed that it is the "commercial norm" for parties to maritime shipping arrangements to treat the middleman "as the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." *Id.* at 1176 ("[b]oth commentators and courts have recognized" this principle); *accord Morrow Crane Co. v. Affiliated FM Ins. Co.*, 885 F.2d 612, 614-15 (9th Cir. 1989). Thus, the cargo owner would be bound by the terms of the bill of lading issued by the carrier to the freight forwarder. See *Kukje*, 294 F.3d at 1177.

Norfolk Southern, No. 02-1028, Pet. 14-15.

Although Norfolk Southern agrees that the freight forwarder in its case was acting in the capacity of an NVOCC, its petition does not challenge the correctness of the Eleventh Circuit's decision in the light of the Shipping Act. Norfolk Southern's only reference to the act is its

citation of the NVOCC definition at section 3(17)(B), 46 U.S.C. app. § 1702(17)(B). *See Norfolk Southern*, No. 02-1028, Pet. 14-15 n.4.

Norfolk has little to gain by focusing this Court's attention on the statutory role and status of NVOCCs because the Eleventh Circuit concluded, in a manner consistent with the Shipping Act, that the freight forwarder-*cum*-NVOCC in *James N. Kirby* was *not* the agent of the shipper. The court of appeals held that ICC was a carrier, such that the shipper was not bound by ICC's contract with Hamburg Süd, whose vessel carried the goods. Rather, Norfolk Southern asks this Court to reverse the Eleventh Circuit on the basis of the Ninth Circuit's decision in this case – a decision that refers to the statutory definition of NVOCC and then proceeds to contradict it.

THE CIRCUIT CONFLICT REFLECTS THE CONFLICTING INTERESTS OF SHIPPERS AND CARRIERS

Viewed together, the petition herein and Norfolk Southern's petition in No. 02-1028 reveal that the Ninth and Eleventh Circuits have reached diametrically opposite conclusions about whether a non-vessel-operating common carrier is the agent of its shipper and thereby binds the shipper to the ocean common carrier. The importance of resolving this circuit conflict is illustrated by the fact that two petitions – seeking conflicting results – have been scheduled for Conference on the same day. As both petitions argue, the question whether the relationship between shipper and NVOCC is an agency relationship or a shipper-carrier relationship has important consequences

for the shipping industry. As petitioner herein argues, the Ninth Circuit's disposition of the question will complicate and may impede the Federal Maritime Commission's efforts to regulate transactions between shippers and NVOCCs, a part of its mandate under the Shipping Act. *See* Pet. 21-22.

The petition herein explains the position of shippers who believe they should not be held bound to ocean carriers with whom they did not contract and to carrier bills of lading they never saw and to which they did not assent. Norfolk Southern's petition presents the position of carriers who believe they should be allowed to enforce their contracts with NVOCCs against shippers with whom they did not contract. Petitioner submits that the conflicting positions of carriers and shippers – mirrored in the conflicting decisions of the Ninth and Eleventh Circuits – should be resolved by a proper construction of the Shipping Act's definition of the role and status of NVOCCs.

THE SHIPPING ACT GOVERNS THE QUESTION INVOLVED IN THIS CIRCUIT CONFLICT

As noted, Norfolk Southern would prefer to have this Court resolve the circuit conflict without resorting to the Shipping Act. The railroad takes the position that this Court should adopt the Ninth Circuit's conclusion that NVOCCs are shippers' agents, even though that decision contravenes the Shipping Act's definition of the NVOCC.

Petitioner's petition recited the lengthy history behind the regulation of NVOCCs, noting that the Federal Maritime Commission, at its creation, took up the project begun by its predecessor agency to require NVOCCs – like

vessel-operating common carriers – to establish and abide by their own carrier tariffs. *See* Pet. 13-16. For four decades the Commission has considered it necessary to regulate NVOCCs in order to achieve the purposes of the Shipping Act. Congress evidently agreed because it established a definition of NVOCCs and authorized the Commission to regulate them as part of the Shipping Act of 1984.

Norfolk Southern's petition is silent on the effect of the Shipping Act; the railroad apparently would rather have the Court resolve this circuit conflict without considering the statute that creates and defines the NVOCC. Presumably, Norfolk Southern would like this Court to resolve this conflict without seeking the Federal Maritime Commission's views on the question. Petitioner respectfully asks the Court to consider its petition in the proper statutory context: Which of the conflicting circuit opinions squares with the Shipping Act?

CONCLUSION

As Norfolk Southern chose not to present the issue in its proper statutory context, petitioner respectfully asks the Court to grant its petition herein and to hold Norfolk Southern's petition pending review of this matter.

Respectfully submitted,

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No. 02-813

IN THE

Supreme Court of the United States

GREEN FIRE & MARINE INSURANCE CO., LTD.,

Petitioner,

v.

M/V HYUNDAI LIBERTY, *in rem*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RESPONDENT'S SUPPLEMENTAL BRIEF

Respondent M/V HYUNDAI LIBERTY, in response to the Brief for the United States as Amicus Curiae, respectfully requests that the instant petition not be held pending this Court's disposition of the pending petition for a writ of certiorari in *Norfolk Southern Railway v. James N. Kirby, Pty Ltd.*, No. 02-1028 (filed Jan. 6, 2003). Respondent requests that this Court deny the petition for writ of certiorari filed by Green Fire & Marine Insurance Co., Ltd. at this time.

DISCUSSION

The United States suggested in its brief amicus curiae in *Norfolk Southern* (U.S. Br. at 16-20, No. 02-1028) that the Court resolve that case on grounds other than the agency issue which is the subject of the petition in this case. The United States further suggested in its brief amicus curiae in this case (U.S. Br. at 10-13) that this is an "imperfect vehicle" for the Court's possible review of the agency question. This case, as noted by the United States (U.S. Br. at 12), includes case-specific factors which were not briefed in the court of appeals and may not explicitly present the question on which the courts of appeals disagree. The Court would be placed in the position of having to review the evidence presented in the district court and review the facts, in order to dispose of the agency issue, which may not be possible given the underlying history of this case, as set forth in the United States' brief (U.S. Br. at 2-8).

CONCLUSION

Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

GREEN FIRE & MARINE INSURANCE CO., LTD.,
FKA KUKJE HWAJAE INSURANCE CO., LTD.,
Petitioner,

v.

M/V HYUNDAI LIBERTY, *IN REM*,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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THE GOVERNMENT SUPPORTS THE WRONG PETITION FOR THE WRONG REASONS

Some scholars hold that the Solicitor General "has a duty to interpret the law independently of the other executive agencies that he represents." John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 801 (1992) (citing LINCOLN CAPLAN, THE TENTH JUSTICE 3-4 (1987)). Others claim the Solicitor General's role is to mould the law to the President's policy goals: "Contrary to the conventional account, the Solicitor General has no special obligation to the Court. The Constitution, which defines the relation of each branch to the others, provides for no such obligation, nor does any other legal principle require it." *Id.* at 802 (citing Erwin Griswold, *Review of CHARLES FRIED, ORDER AND LAW*, 3 CONST. 73 (1991)).

The government's briefs in this case and in *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.* (No. 02-1028) exemplify the Solicitor General's lack of obligation to interpret the law. The briefs do not provide a legally sound analysis of the circuit conflict presented by these cases. The government proposes holding Green Fire's petition on the conflicted agency issue pending disposition of *Norfolk* and then suggests the agency issue need not be decided in *Norfolk* (*see* U.S. *Norfolk* Br. at 19), as it must in *Green Fire*. This counterintuitive position stems from the government's decision to favor the interests of the railroad lobby over those of the Federal Maritime Commission (FMC) and the shipping public. Because the government treats the circuit conflict presented in *Green Fire* as merely ancillary to the Himalaya Clause issue in *Norfolk*, we must perforce begin with reasons why this Court should not grant Norfolk's petition.

The government urges the Court to create justice-made law to insulate the railroads from the liability regime established by the Carmack Amendment, 49 U.S.C. § 11706, allowing them to limit liability consistent with the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315, the statute that limits the liability of ships and ocean carriers. *See id.* § 1304(5). The government shows no concern for the deficiencies of Norfolk's petition, *viz.*, that it presents no federal question, comes to this

Court through the district court's diversity jurisdiction, and requires, for reversal, judicial construction of a private contract made in Australia by two Australian firms, with an Australian choice of law. The government, moreover, seems unaware that the conflicts law of Georgia—which applies because Kirby invoked the court's diversity jurisdiction—requires the court to apply the *lex loci contractus* (i.e., Australian law).[1]

Given these uncertworthy features, why does the government recommend a writ in *Norfolk*? Because the Surface Transportation Board (STB) requires it. Under the Interstate Commerce Commission Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, the STB regulates interstate rail carriers. With no history of enforcing the Carmack Amendment—preserved by ICCTA at 49 U.S.C. § 11706—the STB is promoting the interests of its rail constituents over those of the shipping public whom the Carmack Amendment was meant to protect from the railroads' overreaching bargaining power. The STB backs Norfolk's attempt to evade statutory Carmack liability by trying to elicit a ruling that Norfolk may claim the benefit of the through bill of lading issued to Kirby by its Australian freight forwarder, International Cargo Control Pty Ltd. (ICC). This result would allow Norfolk (and in future cases all rail carriers) to enjoy the COGSA package limitation Congress enacted for ocean carriers. But this can only be achieved by reading Norfolk into the Himalaya Clause in the ICC bill of lading. *See James N. Kirby, Pty Ltd. v. Norfolk Southern Ry.*, 300 F.3d 1300, 1308 (11th Cir. 2002). The government warns that the Eleventh Circuit's conclusion that that Himalaya Clause did not confer third-party benefits on Norfolk will deprive "Carriers and Shippers [of any] Viable Means Of Contracting Around The Court Of Appeals' Decision." U.S. *Norfolk* Br. at 14. The government professes that basic principles of contract law bar the railroads from finding shelter in such Himalaya Clauses. Evidently, this Court is expected to afford a "*viable means*" by dispensing with the requirement of contractual privity, as it simply

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[1] *See Convergys Corp. v. Keener*, 276 Ga. 808, 811-12, 582 S.E.2d 84, 86-87 (2003) (answering conflicts question certified by Eleventh Circuit), *adopted by Keener v. Convergys Corp.*, 342 F.3d 1264, 1267 (11th Cir. 2003).

is not "feasible for subcontracting carriers to negotiate directly with cargo owners." U.S. *Norfolk* Br. at 14.

Dismissing such impediments as the contract's choice of Australian law, the court's diversity jurisdiction (and hence the *Erie* doctrine), and Georgia's *lex loci contractus* rule, the government searches for a federal question that would warrant this Court's interest in *Norfolk*, and improvises with a maritime case, *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297 (1958). In *Herd*, this Court denied a stevedore third-party benefits under an ocean carrier's bill of lading because the bill contained no clause identifying as a beneficiary either the stevedore or a class of which it was a member. *Id.* at 302. The court of appeals held the ICC Himalaya Clause did not satisfy *Herd*'s specificity requirement as it did not identify "inland carriers" such as Norfolk. *See Kirby*, 300 F.3d at 1309-11.

Nevertheless, the government believes *Herd* compels the conclusion that ICC's Himalaya Clause "extends the protection of [ICC's] limitation [of liability] to petitioner [Norfolk] *as a subcontractor of ICC's chosen ocean carrier*." U.S. *Norfolk* Br. at 18 (emphasis added). The government asks the Court to revise *Herd* and hold that persons with whom ICC contracts and who thereby become third-party beneficiaries of the Kirby-ICC contract should themselves be deemed empowered to create, by further subcontracts, still more beneficiaries—in effect, *fourth-party* beneficiaries, whose own subcontractors then would be *fifth-party* beneficiaries, and so on *ad libitum*. Under the government's theory, Norfolk is a *fifth-party* beneficiary, for it did not contract with ICC's ostensible third-party beneficiary, the vessel-operating Hamburg Süd, but rather with Columbus Line USA (*see Kirby*, 300 F.3d at 1303), an apparent subsidiary of Hamburg Süd. *See id.* n.3. The government would have this Court alter *Herd*'s reliance on the rules of contract construction and hold that, once the parties to a contract create a third-party beneficiary, their beneficiary unilaterally may extend the contract's benefits to its own subcontractors and, through them, to subsequent generations of subcontractors.

Besides ushering the Court towards this dubious legal morass, the government's *Norfolk* brief does not propose a tenable fed-

eral basis for this Court's interest in, or any subject-matter jurisdiction other than diversity of citizenship for, deciding Norfolk's Himalaya Clause issue. *Herd* apparently reached this Court as a case arising under COGSA, but the Court discerned that COGSA was silent on whether an ocean carrier could extend the benefit of its statutory limitation of liability to a stevedore (*see Herd*, 359 U.S. at 300-03), and ultimately applied common law to construe the bill. *See id.* at 306-08. Although *Herd* does not discuss the basis of subject-matter jurisdiction, it reasonably can be assumed that the Court took it as given that it was interpreting the ocean carrier's bill of lading under the general maritime law of the United States.

Norfolk's petition tries to cast this as a COGSA case and the government's amicus brief adverts repeatedly to COGSA or COGSA's package limitation. *See* U.S. *Norfolk* Br. at 2-3, 14-18. But COGSA no more applies to the third-party benefits claimed by Norfolk than it did the third-party benefits claimed by the stevedore in *Herd*. *See Herd*, 359 U.S. at 301-02. The maritime law would, thus, appear to be the only subject matter on which the railroads and government arguably could base their request for review. The government in fact expresses this belief by titling section I of its brief, "The Petition Presents Important Questions of Maritime Law on Which the Major Maritime Circuits Are Divided." U.S. *Norfolk* Br. at 7.

By relying of necessity on the general maritime law, Norfolk and the government encounter a jurisdictional difficulty that did not beset the stevedore in *Herd*. The stevedore was loading a ship, and its liability arose when it dropped some of the cargo it was loading into Baltimore Bay. *See Herd*, 359 U.S. at 298. This sounds, intuitively, like a proper subject of the maritime law—determining the extent of a stevedore's liability for dropping goods into a navigable waterway of the United States. But Norfolk cannot demonstrate a maritime nexus: It damaged Kirby's goods when the railcar on which they were moving fell off the tracks on the way from Savannah, Georgia to Huntsville, Alabama. *See* U.S. *Norfolk* Br. at 5. Norfolk furnished no maritime service, performed no maritime contract, unloaded no maritime vessel, and dropped no goods into navigable waters of

the United States. There is no maritime jurisdiction of Norfolk's petition, and maritime law does not govern its merits.

If any federal law applies to Norfolk's activities, it is the Carmack Amendment, enacted in 1906 to modify the Interstate Commerce Act, 24 Stat, 386 (1887). As currently codified, Carmack holds rail carriers liable for the actual damages sustained during rail transportation within the federal jurisdiction set forth in ICCTA. *See* 49 U.S.C. § 11706(a), (c)(1). The applicable jurisdiction under ICCTA appears at *id.* § 10501. As the government advises, the Ninth Circuit, interpreting section 10501(2)(F), has held that Carmack applies to "'the inland leg of an overseas shipment conducted under a single "through" bill of lading * * * to the extent that the shipment runs beyond the dominion of [COGSA].'" *See* U.S. *Norfolk* Br. at 11 (citing *Neptune Orient Lines, Ltd. v. Burlington N. & S.F. Ry.*, 213 F.3d 1118, 1119 (9th Cir. 2000)). If *Neptune* is correct, the Carmack Amendment applies statutorily to the interstate leg of the overseas shipment which Norfolk conducted under ICC's through bill of lading because that interstate leg from Savannah to Huntsville ran beyond COGSA's dominion, which ended when Kirby's goods were discharged from the ship at Savannah. *See* COGSA § 1(e), 46 U.S.C. app. § 1301(e).

The government questions *Neptune* by citing cases that construe *repealed versions* of Carmack's jurisdictional provisions.[2] *Neptune* is the only appellate opinion that construes 49 U.S.C. § 10501 as now in force under ICCTA.

Nor is *Norfolk* a proper vehicle for this Court's initial interpretation of whether Carmack preempts a rail carrier's claim to the ocean carrier's limitation of liability. As the government advises, "the Carmack Amendment issue was not raised in the lower courts or in respondents' brief in opposition." U.S. *Norfolk* Br. at 12. The government contends the Carmack issue has

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[2] *See* U.S. *Norfolk* Br. at 12 (citing *Reider v. Thompson*, 339 U.S. 113 (1950) (interpreting 49 U.S.C. § 20(11) (**repealed 1978**)); *Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391 (7th Cir. 1992) (construing former 49 U.S.C. § 10501 (92 Stat. 1359)(**repealed 1995**)); *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987) (***motor carriage*** under 49 U.S.C. § 10521(a)(1)(E)(**repealed 1995**)).

been "waived," *id.*, and urges the Court to resolve the Himalaya Clause issue as though the question of preemption by Carmack does not exist. Yet the waiver of a statutory right by one shipper cannot operate to waive the rights of future Carmack shippers. A waiver in this case cannot produce the general rule sought by the railroads and the government because that rule would contravene the statutory policy behind the Carmack Amendment. This "waiver" argument would produce only a declaration of the rights of Kirby and Norfolk under one bill of lading, not the rights of shippers and rail carriers generally. And, as Kirby's appeal is interlocutory, the Carmack issue would still be open on remand to the district court.

The preemptive effect of the Carmack Amendment reveals why Norfolk's petition and the AAR's brief do not mention it. Concerned that Carmack may apply, the government addresses this omitted issue on their behalf, informing the Court of Norfolk's position, presumably to be disclosed in Norfolk's anticipated brief on the merits, that the interstate rail transportation Norfolk furnished was exempt from Carmack's liability provisions by virtue of 49 U.S.C. § 10709, another ICCTA provision which allows shippers and carriers to contract at arm's length for terms alternative to Carmack. *See* U.S. *Norfolk* Br. at 12. Besides reporting what Norfolk privately represented to the Solicitor General about its position on the Carmack issue, the government's brief propounds a statistical argument by the STB that, during an unspecified period, 56% of all rail transportation under through bills of lading like those in *Neptune* and *Norfolk* was exempt from Carmack liability by virtue of section 10709. Bereft of any record evidence of whether an exemption applies in this case, the government concludes that "the Carmack Amendment's liability rules . . . *do not apply to a large amount of cargo carried by railroads* under such bills, including, *it appears*, Kirby's cargo in this case." U.S. *Norfolk* Br. at 12 (emphases added). If the STB's statistics are accurate, the government's conclusory statement that Norfolk is exempt from Carmack in this case has only a 44% chance of being completely wrong. Under FED. R. CIV. P. 56(c), this statistic would create a genuine issue of material fact. Under the government's analysis, however, it justifies a grant of certiorari.

The government urges this Court to grant Norfolk's petition notwithstanding *Neptune*'s reading of ICCTA's jurisdictional grant, under which the Carmack Amendment's liability scheme would apply. *See Neptune*, 213 F.3d at 1119. Carmack would preempt any contractual provision that purports to bestow on the railroad the ocean carrier's COGSA limitation unless Norfolk could prove it entered into a section 10709 contract with Kirby. *See* 49 U.S.C. § 11706(c). But the Carmack issue was never addressed below, Norfolk thus far has argued only through the Solicitor General that its service was exempt, and there is no record evidence of a putatively exempt contract and only a 56% statistical chance that one actually exists. It is apparent that, in this case, the Solicitor General is not the tenth Justice but an outspoken friend of the railroads.[3]

GREEN FIRE PRESENTS A CIRCUIT CONFLICT THAT SHOULD BE RESOLVED

The government treats the conflict in the circuits in some depth at U.S. *Green Fire* Br. at 8-10. But in its *Norfolk* brief the government loses sight of the circuit conflict by a determined focus on its primary goal of persuading the Court to apply the COGSA limitation to a railroad that may well be subject to countervailing statutory liability under the Carmack Amendment. The government tries to deter interest in *Green Fire* by suggesting that it does not present a clean legal issue: "[T]his case may not cleanly present the question on which the courts of appeals disagree—that is, whether, *absent case-specific factors indicating agency*, an agency relationship exists between a

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[3] So intent is its advocacy that the government simply overlooks two critical difficulties created by Norfolk's reliance on section 10709. First, that section permits contracts between rail carriers and "one or more purchasers of rail services to provide specified services under specified rates and conditions." 49 U.S.C. § 10709(a). Norfolk did not raise this argument below or produce evidence of such a contract with Kirby. That could be difficult, considering Norfolk did not contract directly with Kirby and is, at best, a *fifth-party beneficiary* of ICC's bill of lading. Second, section 10709 expressly withholds federal question jurisdiction: "This section does not confer original jurisdiction on the district courts of the United States based on section 1331 or section 1337 of title 28, United States Code." 49 U.S.C. § 10709(c)(2). Thus, should Norfolk ever produce such a contract in this case, it would have to be interpreted not under federal law but under the *lex loci contractus*.

shipping intermediary (especially an NVOCC) and a cargo owner when the intermediary arranges with a shipowner for transport." U.S. *Green Fire* Br. at 12 (original emphasis).

But the court of appeals' opinion belies the government's argument: "Both commentators and courts have recognized that an NVOCC *generally acts* as the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." *Green Fire* Pet. App. at App. 8—App. 9 (emphasis added). Further, the court noted: "Nothing in the record suggests that the relationship between Doosan [the shipper] and Glory Express [the NVOCC] deviated from *that commercial norm*." *Id.* at App. 10 (emphasis added).[4] These excerpts reveal that the Ninth Circuit held that NVOCCs are agents of the shipper as a "*commercial norm*"—in pointed conflict with the Shipping Act definition of NVOCC, 46 U.S.C. app. § 1702(17)(B), and contrary to *Kirby*, 300 F.3d at 1306-07. The government characterizes the Ninth Circuit's decision as construing a clause in the bill of lading which authorized the NVOCC to use alternate means of conveyance, such as "trucks, trains, or planes." U.S. *Green Fire* Br. at 11-12 (citing Pet. App. at App. 10). This type of clause appears in virtually all bills of lading to protect the carrier from claims that it deviated from the contract by using substitute vessels or vehicles to move the goods. *See Berkshire Fashions, Inc. v. M.V. HAKUSAN II*, 954 F.2d 874, 883 (2d Cir. 1992) (citing GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY 178 (2d ed. 1975)). Such a clause does not confer agency authority on the carrier to bind the shipper to any contract the carrier is required to enter with a subcontractor to obtain a substitute conveyance, a concept readily understood by previous Ninth Circuit panels: *See Sea-Land Service, Inc. v. Lozen Int'l, LLC*, 285 F.3d 808, 817 n.7 (9th Cir. 2002) (explaining this is a "liberty clause" meant to avoid deviation); *Yang Mach. Tool Co. v. Sea-Land Service, Inc.*, 58 F.3d 1350, 1353 n.3 (9th Cir. 1995). By seizing

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[4] "In short, because an NVOCC is considered, *in general, to act* as an agent for the cargo's owner when it contracts for carriage on a vessel, and because in this case Glory Express, consistent with *that commercial norm*, was acting as Doosan's agent when it accepted the Hyundai bill of lading, Plaintiff is bound by that bill." *Id.* at App. 11 (emphases added).

on and misconstruing the liberty clause in the NVOCC's bill of lading, the panel ignored its own circuit precedent; and the government, by uncritically accepting the panel's blatant misconstruction, betrays a similar lack of knowledge about the function of the common liberty clause.

By holding that the NVOCC is "*generally*" and as a matter of "*commercial norm*" the agent of the shipper and binds the shipper to its contract with the vessel-operating carrier, the Ninth Circuit's *Green Fire* holding contradicts the Shipping Act. The Act codifies the regulatory approach of the FMC and its predecessor agency (*see* U.S. *Norfolk* Br. at 19) by defining the NVOCC as a *carrier*, not an agent, in its relations with the shipper, and as a *shipper*, not an agent, when it contracts with the vessel-operating ocean common carrier. *See* U.S. *Green Fire* Br. at 10 (citing 46 U.S.C. app. §§ 1702(6) and (17)(B)).

The Ninth Circuit's contradiction of this statutory definition explains why the FMC participated in the government briefs in *Green Fire* and *Norfolk*. As the agency charged with the duty of enforcing the Shipping Act and of regulating NVOCCs (*see* U.S. *Norfolk* Br. at 10), the FMC has a strong interest in reversal of the Ninth Circuit's circumvention of the Act. To that end the FMC first encouraged Green Fire to file its petition herein and then drafted an amicus curiae brief, which it asked the Solicitor General's permission to file in support of Green Fire's petition. The Solicitor General denied the FMC's request; his willingness to address the FMC's concerns is limited, apparently, to the following recommendation:

> Finally, we have suggested that, if the Court does address the agency issue in *Norfolk Southern*, its analysis should consider the Shipping Act of 1984, . . . including the Act's provisions specifying that, *although NVOCCs operate and are regulated as common carriers, they are shippers in their relationships with vessel-operating common carriers*. . . . If the Court does address the agency issue in *Norfolk Southern*, then its decision may determine the correct resolution of the agency issue in this case.

U.S. *Green Fire* Br. at 10 (citations omitted, emphasis added).

The government does not support Green Fire's petition because it does not present the Himalaya Clause issue so dear to Norfolk, the AAR, and the STB, who apparently wield more clout than the FMC. But *Green Fire* does provide the better vehicle for resolving the *circuit conflict*, both because the NVOCC in this case was licensed as an NVOCC and ICC was not, and because the Shipping Act can be enforced as written only by reversing the Ninth Circuit. The circuit conflict presumably is why these cases are being considered together and why the government does not call for denial of Green Fire's petition. Yet its preoccupation with the railroad lobby's Himalaya Clause issue has prompted the government to conjecture that this Court need not decide the agency issue on which the circuit conflict turns! *See* U.S. *Norfolk* Br. at 19-20; U.S. *Green Fire* Br. at 2.

If the Court grants Green Fire's petition, it can resolve the circuit conflict, which the government admits exists (*see* U.S. *Green Fire* Br. at 8-10), and enforce the statutory definition of NVOCC, so vital to the FMC. *See* U.S. *Norfolk* Br. at 10 ("Congress recognized the important role of shipping intermediaries in the Shipping Act of 1984 . . . which . . . establishes regulatory oversight of their activities by the Federal Maritime Commission.") If *Green Fire* is held pending disposition of Norfolk's petition, as the government urges, this Court will have to interpret an Australian contract under Australian law to decide whether a railroad, in a case sounding in diversity, may limit is liability as a putative *fifth-party* beneficiary of a COGSA bill of lading even though, as the government concedes (*see* U.S. *Norfolk* Br. at 11-12), the railroad's liability may be governed by the statutory prescriptions of the Carmack Amendment, an issue that was neither raised nor decided below.

CONCLUSION

The one issue these cases share in common is whether a carrier that does not operate a vessel is the shipper's agent and binds the shipper to the vessel operator's bill of lading. Because *Norfolk* presents this issue under Australian law and *Green Fire* presents it under the Shipping Act, petitioner respectfully asks the Court to grant the petition in *Green Fire* and hold the petition in *Norfolk* pending disposition of this case on the merits.

Respectfully submitted,

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No. 02-813

In the Supreme Court of the United States

GREEN FIRE & MARINE INSURANCE CO., LTD., FKA KUKJE HWAJAE INSURANCE CO., LTD., PETITIONER

v.

M/V HYUNDAI LIBERTY, IN REM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Petitioner is the subrogee of a foreign cargo owner who contracted with a non-vessel-operating common carrier (NVOCC) to ship goods to the United States. The question presented is whether petitioner is bound by the forum-selection clause in the bill of lading that a shipowner issued to the NVOCC for transport of the cargo-owner's goods.

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GREEN FIRE & MARINE INSURANCE CO., LTD.,
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M/V HYUNDAI LIBERTY, IN REM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. Petitioner seeks review of a decision in which the United States Court of Appeals for the Ninth Circuit determined that a non-vessel-operating common carrier (NVOCC), as defined in the Shipping Act of 1984, 46 U.S.C. App. 1702(17)(B), acted as a cargo owner's agent in accepting a bill of lading from a shipowner. On that basis, the court of appeals concluded that the cargo owner was contractually bound by the forum-selection clause in the shipowner's bill of lading. The circuit conflict on which petitioner relies (Pet. 11-12, 22-27) is one subject of the pending petition for a writ of certiorari in *Norfolk Southern Railway* v. *James N. Kirby, Pty Ltd.*, No. 02-1028 (filed Jan. 6,

2003). In *Norfolk Southern*, the United States has filed a brief amicus curiae at the Court's invitation and suggested that the petition should be granted, but that the case should be resolved on grounds separate from the agency issue this case presents. The instant petition does not independently merit review by this Court. Accordingly, it should be held pending this Court's disposition of the petition in *Norfolk Southern* and then disposed of as appropriate in light of the final disposition of that case.

STATEMENT

1. Petitioner insured a lathe that a Korean company, Doosan Corporation (Doosan), manufactured and sold to a company in Michigan. Pet. App. 3; Pet. 3. Doosan contracted with Glory Express, Inc. (Glory Express) to ship the lathe from Busan, Korea, to Los Angeles. Pet. App. 3. Glory Express is licensed as an NVOCC by the Federal Maritime Commission. See *ibid.*; Pet. 4 & n.2; see also 46 C.F.R. Pt. 515.[1]

Glory Express issued Doosan three substantively identical bills of lading for containers holding the lathe. Pet. App. 3; see C.A. E.R. 138-143 (Glory Express-Doosan bills of lading). The bills of lading are contractual documents recording that Glory Express received

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[1] The Shipping Act of 1984 creates the statutory classification of "ocean transportation intermediary," which includes both "ocean freight forwarders" and NVOCCs. 46 U.S.C. App. 1702(17). Ocean freight forwarders arrange for shipments from the United States via common carrier "on behalf of shippers." 46 U.S.C. App. 1702(17)(A). NVOCCs operate and are regulated as common carriers, although they do not own the vessels used for transport. NVOCCs are defined as shippers in their relationships with vessel-operating common carriers. See 46 U.S.C. App. 1702(6) and (17)(B).

the goods from Doosan and "govern[ing] the relationship of the parties before delivery of the goods." 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* 60 (3d ed. 2001). The bills named Doosan as the shipper of the goods, the buyer of the lathe as the consignee, a ship called the Hyundai Liberty as the "exporting carrier," Busan as the port of loading, and Los Angeles as the port of discharge and place of delivery. Pet. App. 3; C.A. E.R. 138, 140, 142. The bills stated in part that

> [Glory Express] shall have the right at its sole discretion to use feederships, ferries, lighters, trucks, trains or planes, in addition to the Ocean Vessel or its substitute, to accomplish said carriage. If the goods are shipped from or are consigned to a port or place not directly served by [Glory Express]'s own vessel, * * * [Glory Express] will, acting only as the Shipper's AGENT, arrange for transportation of the shipment by other carriers from the place of shipment to the port of loading on [Glory Express's] vessel and from the port of discharge from [Glory Express's] vessel to ultimate destination, and during such segments of transportation the carriage, handling or storage of the goods shall be subject to the freight contracts and tariffs of such other carriers.

C.A. E.R. 139, 141, 143 (preamble). The bills further provided that "the [parties] agree that any suits against [Glory Express] shall be brought in the Federal Courts of the United States in the City of New York." *Ibid.* (Cl. 19).

Glory Express, acting through an agent, contracted with Hyundai Merchant Marine Co., Ltd. (Hyundai) to ship the lathe to California on the Hyundai Liberty. Pet. App. 3 & n.1; see C.A. E.R. 154-155 (Hyundai-

Glory Express bill of lading). The Hyundai-Glory Express bill of lading identified Glory Express's agent as the shipper and consignee of the goods, the Hyundai Liberty as the ocean vessel, Busan as the place of receipt of the goods, and Los Angeles as the port of discharge and place of delivery. *Id.* at 154. The bill stated that claims arising under it are governed by the law of Korea except as otherwise provided, and "[a]ny and all action concerning custody or carriage under this Bill of Lading whether based on breach of contract, tort or otherwise shall be brought before the Seoul Civil District Court in Korea." Pet. App. 4 (quoting C.A. E.R. 155 (Cl. 30)).

2. Petitioner alleges that Doosan's lathe was damaged during the sea voyage from Korea to Los Angeles. Pet. App. 4. Petitioner paid Doosan's insurance claim for the damage and brought admiralty actions in the United States District Court for the Central District of California against Glory Express in personam and the ship Hyundai Liberty in rem. *Ibid.*; see Fed. R. Civ. P. 9(h); *id.* Supp. R. Admiralty & Mar. Cl. B, C. Petitioner asserted causes of action for damage to cargo, breach of contract, negligence, breach of duty to care for property in bailment, and unseaworthiness. Pet. App. 4, 25, 36. The instant petition involves only petitioner's action in rem against respondent. See Pet. ii, 4-10.

a. In the action in rem, the respondent ship (represented by Hyundai as its owner, see Pet. App. 4 n.2) filed a motion to dismiss for improper venue. Respondent argued in its motion that, under the forum-selection clause in the Hyundai-Glory Express bill of lading, the action could be maintained only in Korea. *Id.* at 25, 36. The district court denied the motion. *Id.* at 23-33. It concluded in pertinent part that petitioner is not

bound by the forum-selection clause in the Hyundai-Glory Express bill of lading because, although Doosan was contractually identified as a party to the bill, see *id.* at 28-30, neither Doosan nor petitioner had taken any action demonstrating their acceptance of that bill and, in particular, petitioner had not sought to enforce the Hyundai-Glory Express bill in the in rem action. *Id.* at 30-32; see *id.* at 4-5 & n.3. The court stated that if petitioner subsequently "'accept[ed]' the Hyundai Bill of Lading by, for example, relying on its terms to establish an element of its claims, the Court would entertain a renewed motion to enforce the forum selection clause contained therein." *Id.* at 32; see also *id.* at 38-40 (denying motion for reconsideration).[2]

b. Petitioner and respondent filed cross-motions for summary judgment on the issue of respondent's liability. Pet. App. 17. The district court first rejected petitioner's argument that respondent's liability was established by the court's finding, in the in personam action, that Glory Express is liable to petitioner in the amount of $3000 under the Glory Express-Doosan bill of lading. *Id.* at 18-19. The district court observed that Glory Express, as an NVOCC, was a common carrier with respect to Doosan, but further stated that Glory Express was an agent of Doosan, "and thus merely a customer" of Hyundai, when it contracted for ocean carriage of Doosan's cargo on the Hyundai Liberty. *Id.* at 19 (quoting *Insurance Co. of N. Am.* v. *S/S Ameri-*

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[2] Respondent also filed a motion for partial summary judgment on the ground that the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. App. 1304(5), limits its in rem liability to $3000. See generally U.S. Br. at 2-3, *Norfolk S. Ry.*, *supra* (No. 02-1028) (discussing COGSA). The district court granted that motion. Pet. App. 5, 18.

can Argosy, 732 F.2d 299, 301 (2d Cir. 1984)). The court concluded that, because Glory Express's relationship with Hyundai was that of customer and carrier, Glory Express's liability under its own bill of lading did not extend to Hyundai, which issued a separate bill. *Ibid.*

The district court then addressed petitioner's argument that the Hyundai-Glory Express bill—which stated that respondent received goods from Glory Express in good condition, see C.A. E.R. 155 (preamble)—was prima facie proof of respondent's liability for damage to the lathe. Pet. App. 19. The court determined that petitioner's reliance on the Hyundai-Glory Express bill in making that argument constituted acceptance of the terms of the Hyundai-Glory Express bill. *Id.* at 20. In addition, the court determined that petitioner *had to* base its claim against respondent on the Hyundai-Glory Express bill, because, absent "unusual circumstances," *id.* at 21, "the liability of a carrier [*i.e.*, respondent] is determined by its own bill of lading even where the actual owner [of the cargo] and the shipper deal through the intermediary of an NVOCC," *id.* at 20.

The district court therefore denied petitioner's motion for summary judgment on the ground that petitioner had no cause of action other than a potential claim in Korea under the Hyundai-Glory Express bill. Pet. App. 21. The court dismissed all claims against respondent "without prejudice to Plaintiff's right to bring a claim that complies with the forum selection clause of the Hyundai[] Bill[] of Lading." *Ibid.*

3. The Ninth Circuit affirmed the district court's dismissal of petitioner's in rem action, but on different grounds. Pet. App. 1-16. The court of appeals first determined that petitioner's in rem action is a type of action subject to the forum-selection clause in the

Hyundai-Glory Express bill, *id.* at 7, and that requiring petitioner to sue in Korea would not violate COGSA, *id.* at 8.

Then, the court concluded that the forum-selection clause in the Hyundai-Glory Express bill is binding on petitioner because "the commercial role of an NVOCC, as well as the facts of this case, lead to the conclusion that Glory Express was acting as Doosan's agent when it accepted the Hyundai bill of lading." Pet. App. 8. The court noted that under the Shipping Act of 1984, an NVOCC like Glory Express "is a shipper in its relationship with an ocean common carrier." *Ibid.* (quoting 46 U.S.C. App. 1702(17)(B)). But the court further reasoned that "an NVOCC generally acts as the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." Pet. App. 8-9.

The court of appeals found "[n]othing in the record [that] suggests that the relationship between Doosan and Glory Express deviated from that commercial norm" of principal and agent. Pet. App. 10. "To the contrary," the court continued, "the record shows that Doosan intended Glory Express to act as its agent for the purpose of shipping the lathe." *Id.* at 10 & n.5. The court emphasized that the Glory Express-Doosan bill of lading authorized Glory Express to arrange for carriage of Doosan's lathe and to use whatever mode of transportation Glory Express deemed appropriate for the trip from Busan to Los Angeles. *Id.* at 10; see p. 3, *supra.* The court further stated, however, that "the relationship between Glory Express and Doosan was [not] one of agent and principal for all purposes." Pet. App. 10 n.5. The court suggested that Glory Express could be considered a "special agent[] * * * authorized to conduct a single transaction or series of transactions

not involving continuity of service." *Ibid.* (citing William A. Gregory, *The Law of Agency and Partnership* § 7 (2d ed. 1990)).

Having determined that Glory Express acted as Doosan's agent in accepting Hyundai's bill of lading, the court concluded that Doosan, and petitioner as its subrogee, are bound by that bill's forum-selection clause. Pet. App. 11. Thus, in the court of appeals' view, the district court should have dismissed the case "at the outset of the litigation" for lack of jurisdiction. *Ibid.* For those reasons, the court affirmed the district court's dismissal of the in rem action. *Id.* at 15.[3]

DISCUSSION

THE PETITION SHOULD BE HELD FOR *NORFOLK SOUTHERN RAILWAY CO.* v. *JAMES N. KIRBY, PTY LTD.*, NO. 02-1028, AND THEN DISPOSED OF AS APPROPRIATE IN LIGHT OF THE FINAL DISPOSITION OF THAT CASE

A. *Norfolk Southern* And The Instant Case Present A Common Issue On Which The Circuits Disagree

The pending petition in *Norfolk Southern Railway Co.* v. *James N. Kirby, Pty Ltd.*, No. 02-1028 (filed Jan. 6, 2003), involves the issue whether a foreign cargo owner who shipped goods to an inland destination in the United States using a shipping intermediary was bound by liability limitations in the intermediary's bill of lading, or in the bill of lading that a subcontracting

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[3] In the in personam action against Glory Express, the court of appeals affirmed the district court's determination that COGSA does not bar the enforcement against petitioner of the limitation on carrier liability in the Glory Express-Doosan bill of lading. Pet. App. 12-15. That aspect of the court of appeals' decision is not at issue in this Court.

ocean carrier issued to the intermediary, when suing a railroad that subcontracted with the ocean carrier to deliver the goods to their destination. Question 1 of the *Norfolk Southern* petition is "[w]hether a cargo owner that contracts with a freight-forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation." Pet. at i, *Norfolk S. Ry.*, *supra* (No. 02-1028).

As the United States explains in its brief amicus curiae in *Norfolk Southern* (at 7-8), the Eleventh Circuit's decision in that case conflicts with the Ninth Circuit's decision in this case, and with decisions of the Second and Third Circuits, as to the nature of the relationship that is presumed to exist between a cargo owner and a shipping intermediary that arranges for physical transport of the cargo, when contract provisions and the surrounding circumstances do not clearly establish agency *vel non*. The Second, Third, and Ninth Circuits presume an agency relationship in that situation. See Pet. App. 8-10 (recognizing "commercial norm" that NVOCCs contract with shipowners as agents of cargo owners); *SPM Corp.* v. *M/V Ming Moon*, 22 F.3d 523, 527 (3d Cir. 1994) ("under COGSA, the carrier treats the NVOCC as the customer's agent, although the customer treats the NVOCC as a carrier"); *Insurance Co. of N. Am.* v. *S/S American Argosy*, 732 F.2d 299, 301 (2d Cir. 1984) ("With respect to the vessel and her owner, * * * the NVOCC is an agent of the shipper, and thus merely a customer."). The Eleventh Circuit articulated a conflicting rule in the *Norfolk Southern* case, stating that "special particular arrangements" are necessary to demonstrate that a shipping intermediary is acting as an agent of the shipper, rather than as an independent contractor.

James N. Kirby, Pty Ltd. v. *Norfolk S. Ry.*, 300 F.3d 1300, 1306 (11th Cir. 2002); see *id.* at 1305 (intermediary "acts as an agent when its role is merely to arrange a contract between the cargo owner and the ocean carrier"); see also *id.* at 1307 n.9 (discussing regulatory status of intermediary in that case).

In response to this Court's invitation in *Norfolk Southern*, the United States has suggested that the petition in that case should be granted. See U.S. Br. at 7-20, *Norfolk S. Ry.*, *supra* (No. 02-1028). We have further suggested that the Court resolve that case on grounds other than the agency issue that is the subject of the petition for a writ of certiorari in this case. See *id.* at 16-20. Finally, we have suggested that, if the Court does address the agency issue in *Norfolk Southern*, its analysis should consider the Shipping Act of 1984, 46 U.S.C. App. 1701 *et seq.*, including the Act's provisions specifying that, although NVOCCs operate and are regulated as common carriers, they are shippers in their relationships with vessel-operating common carriers. See 46 U.S.C. App. 1702(6) and (17)(B). If the Court does address the agency issue in *Norfolk Southern*, then its decision may determine the correct resolution of the agency issue in this case.

B. The Ninth Circuit's Decision In The Instant Case Does Not Independently Warrant Review

As explained, the *Norfolk Southern* case, even if reviewed by this Court, may not provide an occasion to address the agency issue on which the courts of appeals disagree. Despite that possibility, the United States does not recommend granting certiorari on the agency issue in the instant case.

In the first place, if the Court does grant review in *Norfolk Southern*, its resolution of that case on the

grounds suggested by the United States could render the present conflict among the courts of appeals on the agency issue far less significant, particularly in the context of determining carrier liability. See U.S. Br. at 16-19, *Norfolk S. Ry.*, *supra* (No. 02-1028).[4] Indeed, if the judgment of the Eleventh Circuit is reversed, the circuit conflict, which petitioner cites (Pet. 10) as one of two reasons for this Court's review, might be eliminated altogether. The Eleventh Circuit is the only Circuit that has rejected the rule adopted by the Second, Third, and Ninth Circuits. Eleventh Circuit law was unsettled on the agency issue before *Norfolk Southern*, see Pet. 22-23, and *Norfolk Southern*'s holding on that issue has not been adopted in any more recent Eleventh Circuit decision.

In addition, the court of appeals determined in this case, after reviewing the particular provisions of the relevant bills of lading, that "Doosan intended Glory Express to act as its agent for the purpose of shipping the lathe." Pet. App. 10; see also *id.* at 11 ("[I]n this case Glory Express, consistent with th[e] commercial norm, was acting as Doosan's agent when it accepted the Hyundai bill of lading."). If this Court were to grant the petition, the parties likely would disagree whether the court of appeals correctly construed the provisions of the Glory Express-Doosan bill of lading. Compare Pet. 8 (arguing that there was no record evidence to support court's agency finding), with Br. in

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[4] Most often, the agency issue arises in connection with the amount of liability or indemnification obligations under a bill of lading. See, *e.g.*, *Norfolk S. Ry.*, 300 F.3d at 1304-1307 (liability); *M/V Ming Moon*, 22 F.3d at 525-527 (indemnification); *S/S American Argosy*, 732 F.2d at 301-302 (liability); *Naviera Neptuno S.A.* v. *All Int'l Freight Forwarders, Inc.*, 709 F.2d 663 (11th Cir. 1983) (liability).

Opp. 2-3 (arguing that "[a]mple evidence exists in the record to support the Ninth Circuit's finding that Glory Express was acting as Doosan's agent"). The Glory Express-Doosan bill contains at least one provision—stating that Glory Express would serve as Doosan's agent in arranging certain transportation, if Glory Express's own ships were not available—that is not customary in an NVOCC's bill of lading (as NVOCCs by definition are not vessel operators), and that might implicate case-specific issues under the Shipping Act. See p. 3 (quoting bill language) & note 1 (discussing Shipping Act), *supra*. On the other hand, the court of appeals determined based on the record that "the parties intended that Glory Express would be independently liable, to some extent, for loss or damage to the lathe that occurred during shipping." Pet. App. 10 n.5. Those contract-specific issues were not briefed in the court of appeals. See Pet. 8-9. Accordingly, this case may not cleanly present the question on which the courts of appeals disagree—that is, whether, *absent case-specific factors indicating agency*, an agency relationship exists between a shipping intermediary (especially an NVOCC) and a cargo owner when the intermediary arranges with a shipowner for transport.

An additional consideration also contributes to making this an imperfect vehicle for the Court's possible review of the agency question. Although the court of appeals determined that the district court was late in dismissing petitioner's complaint and did so "for the wrong reason," Pet. App. 12, the court of appeals never addressed whether the district court's acceptance theory provides a valid alternative rationale for dismissal. The acceptance theory is a ground on which respondent could attempt to defend the court of appeals' judgment in this Court, and it might complicate

the Court's consideration of the agency issue. See *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994) ("A prevailing party need not cross-petition to defend a judgment on any ground properly raised below."); cf. *El Paso Natural Gas* v. *Neztsosie*, 526 U.S. 473, 479 (1999) ("Absent a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court.").

CONCLUSION

The petition should be held pending this Court's disposition of the pending petition in *Norfolk Southern Railway Co.* v. *James N. Kirby, Pty Ltd.*, No. 02-1028 (filed Jan. 6, 2003), and then disposed of as appropriate in light of the final disposition of that case.

Respectfully submitted.

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